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Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-279

No. _____

****

In the

Supreme Court of the United States

October Term, 1987

****

EMILY RUTH BALLINGER,

Petitioner,

vs.

NORTH CAROLINA
AGRICULTURAL EXTENSION SERVICE, et al.,

Respondents.

****

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**
VOLUME I OF III

****

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****

QUESTIONS PRESENTED FOR REVIEW

1. MAY AN EMPLOYER IMMUNIZE ITSELF FROM LIABILITY FOR EMPLOYMENT DISCRIMINATION BY DELEGATING ITS EMPLOYMENT DECISIONS TO A THIRD PARTY THAT ACTS IN A DISCRIMINATORY MANNER AND WHEN THE EMPLOYER ENGAGES IN ACTS OF OMISSION OR COMMISSION WHICH RESULT IN THE THIRD PARTY'S ACTING IN A DISCRIMINATORY MANNER?

2. WAS SUMMARY JUDGMENT ON PLAINTIFF'S TITLE VII CLAIMS AGAINST THE STATE DEFENDANTS APPROPRIATE BASED UPON THE GENUINE ISSUES OF MATERIAL FACT RAISED BY THE PLEADINGS AND MATTERS OF RECORD, AND WAS THE COURT OF APPEALS CORRECT IN AFFIRMING THE DISTRICT COURT DECISION DISMISSING PLAINTIFF'S TITLE VII CLAIMS AGAINST THE STATE DEFENDANTS?

3. WAS SUMMARY JUDGMENT PROPER AS TO THE PLAINTIFF'S ADEA CLAIM AGAINST THE STATE DEFENDANTS?

4. WAS THE COURT'S DISMISSAL OF THE PLAINTIFF'S CONSPIRACY CLAIM PROPER?

5. WAS SUMMARY JUDGMENT APPROPRIATE ON PLAINTIFF'S CLAIM UNTER 42 USC 1983?

6. WAS SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT APPROPRIATE?

7. MAY A COURT IGNORE AND DISMISS A CLAIM FOR RETALIATION WHEN THE CLAIM HAS NOT BEEN ADDRESSED IN A MOVING PARTY'S MOTION FOR SUMMARY JUDGMENT?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

Emily Ruth Ballinger, Plaintiff-Appellant

and

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE; NORTH CAROLINA STATE UNIVERSITY; HUGH L. LINER, CHESTER D. BLACK, PAUL E. DEW and RUSSELL C. KING, Individually and as agents of North Carolina Agricultural Extension Service and North Carolina State University; BRUCE R. POULTON, Individually and as Chancellor of North Carolina State University;

Defendant-Appellees

The following were Defendants to this proceeding when it was commenced, but the Plaintiff and these Defendants have reached a settlement and the Plaintiff has

dismissed her claims as to these parties:

BOARD OF WARREN COUNTY COMMISSIONERS; WARREN COUNTY; W. J. HARRIS, CLYDE R. EDWARDS, WILLIAM T. SKINNER, III, HERBERT C. HARRIS, GEORGE E. SHEARIN, SR., Individually and as Warren County Commissioners; GLENWOOD NEWSOME, Individually and as Agent of Board of Warren County Commissioners.

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Romero v. Union P. Railroad, 615 F2d 1303 (10th Cir. 1980).

CITATIONS OF OPINIONS HERETOFORE RENDERED IN THIS MATTER

This case at its District Court level is not reported. This case at appellate level is reported at 815 F.2d. 1001 (1987)

GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS SOUGHT

The Judgment which the Plaintiff-appellant-petitioner hereby seeks to have reviewed was decided by the United States Court of Appeals for the Fourth Circuit on April 9, 1987.

It is believed that jurisdiction to review this matter by writ of certiorari is conferred upon the Court by 28 U.S.C. 1254 (1), and Rule 17 of the Rules of the United States Supreme Court in that a federal court of appeals has sanctioned a departure by a lower court of the accepted and usual standard for summary judgment by resolving a genuine dispute of material and relevant facts in favor of the State Defendants, and because the federal court

of appeals has decided an important question of federal law which has not been, but should be settled by the Supreme Court regarding whether or not an employer may immunize himself from liability for employment discrimination by the delegation of its employment decisions to third parties and while surreptiously through acts ot omission and commission virtually guaranteeing that the third party will act in a discriminatory manner. The Court declined to address this issue in Bazemore v. Friday, 478 U.S. ____, 92 L Ed 2d 315, 106 S Ct 3000 (1986) in which a portion of the Defendants in the case at bar were also Defendants (North Carolina Agricultural Extension Service, North Carolina State University) as not having been properly raised.

STATUTES WHICH THIS CASE INVOLVES

This case involves the following statutes:

42 USC 2000e-2(a) (a982) which provides:

> "a. It shall be an unlawful employment practice for an employer--
>
> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

29 U.S.C. 623 (a) (1982 & Supp. III 1985) which provides:

> "It shall be unlawful for an employer--
>
> 1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

> employment, because of such individual's age;
>
> 2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> 3. to reduce the wage rate of any employee in order to comply with this chapter."

42 U.S.C. 1983 (1982) which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

and 42 U.S.C. 1985 (1982), which is set forth in the Appendix at page 498

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

This is a sex and age discrimination case originally brought by the Plaintiff against Board of Warren County Commissioners, Warren County, W. J. Harris, Clyde R. Edwards, William T. Skinner, III, Herbert C. Harris, George E. Shearin, Jr., and Glenwood Newsom (County Defendants) and North Carolina Agricultural Extension Service, North Carolina State University, Hugh L. Liner, Chester D. Black, Paul E. Dew, and Bruce R. Poulton (State Defendants) and Russell G. King (a County Defendant and State Defendant) and disposed of at the District Court as to the County Defendants by settlement and voluntary dismissal and as to the State Defendants by Order allowing the State Defendants, Motion for Summary Judgment. The United States Court of Appeals for the Fourth Circuit affirmed the order of the District Court, and it is

from this decision that the Plaintiff asks the United States Supreme Court to issue its writ of certiorari to the end that this case might be reviewed.

Defendant Chester Black is the Director, Defendant Paul E. Dew is the Assistant Director, and Defendant Hugh L. Liner is a District Director of the North Carolina Agricultural Extension Service. Defendant Bruce R. Poulton is the Chancellor of North Carolina State University. Defendant Russell King was selected Warren County Extension Chairman instead of the Plaintiff.

The North Carolina Agricultural Extension Service (Extension Service) is a division of the School of Agricultural and Life Sciences of North Carolina State University (NCSU). It is headed by a Director (Defendant Chester D. Black) who exercises authority over District Extension Chairmen (Defendant Hugh L. Liner is one such District Chairman)

responsible for administering all Extension Service programs within the State's six Extension Service Districts. The District Extension Chairmen supervise the 100 County Extension Chairmen whose duties and responsibilities are set forth at A.pp. 292-312.

The minimum requirements for the selection of county chairman are six years of service with the Extension Service or the equivalent, at least two years of which must have been with the North Carolina Agricultural Extension Service. A Master's Degree is desirable but is not required, but a bachelor's degree is required.

When the system works as designed, upon learning of an impending vacancy, the District Chairman meets with the County Commissioners and reaches a decision as to the desired qualifications of prospective applicants and with respect to the number of applicants the Board will consider.

The Extension Service then makes an announcement of the vacancy. Each applicant meeting the minimum qualifications is interviewed by the District Chairman (Hugh L. Liner), the assistant director for county operations, the associate director (Paul E. Dew), and the director (Chester D. Black) of the Extension Service. These people then decide whom they will recommend to the County Commissioners. The County Commissioners must then approve the applicant or one of the applicants if more than one is recommended. Final approval of the County Extension Chairman rests with the Extension Service.

Prior to the early 1970's, County Extension Service Chairman were the white male with the greatest seniority in the Extension Service within a county. (A.p. 484.)

Statistical data (from 1974 through 1982) produced by the State Defendants in

Attachment 14 to the State's Answers to Plaintiff's Interrogatories (A.pp. 321-343), disclosed:

a. From 1974 through 1982, there were 82 vacancies of County Extension Chairmanship positions.

b. During the period of time from 1974 through 1982, 75 males, 91.4%, were selected County Extension Chairman, and 7 females, 8.6%, were selected County Extension Chairman.

c. During the period of time from 1974 through 1982, there were 21 vacancies in which there were both male and female applicants. Five, or 24 percent, of the female applicants were appointed and 16, or 76 percent, of the males were appointed.

d. During the period from 1974 through 1982, there were 39 vacancies in which there were both applicants under 40 years of age and those age 40 and older. Twenty-five, or 64

percent, of the under age 40 applicants were appointed County Extension chairmen, while only 14, or 36 percent, of the age 40 and older applicants were successful.

Plaintiff is a white female employee of the North Carolina Agricultural Extension Service. Her date of birth is December 3, 1926.

In the Spring of 1979, Plaintiff applied for the position of Warren County Extension Chairman, but was passed over for the position by a less qualified black male. The appointment of the black male came at a very sensitive time. Blacks within the Extension Service had filed a class-action lawsuit in the United States District Court for the Eastern District of North Carolina alleging discrimination against them on the basis of race (Bazemore v. Friday, 478 U.S. _____, 92 L Ed 2d. 315, 106 S Ct 3000 (1986). When Plaintiff was not named the County

Extension Chairman for Warren County in 1979, she expressed her disenchantment with the Director of the Extension Service, and, although she did not file a charge with the Equal Employment Opportunity Commission (EEOC) her disenchantment was well known to her superiors within the Extension Service. (A.pp. 147-148.)

In March of 1982, a vacancy again arose in the position of County Extension Chairman for Warren County. At that time, Plaintiff was an agent with the Extension Service in Warren County and Defendant Russell King, a white male, age 34, was an associate extension agent in Warren County.

By way of comparison, Russell King had been employed by the North Carolina Agricultural Extension Service for two years and eight months. At the time of the Cooper retirement announcement, Russell King was an Associate Agricultural

Extension Agent. In that capacity, his primary responsibility was to provide continuing education and assistance to Warren County Farmers, particularly in crop sciences. Some of his work was performed through advising and assisting the Warren County Young Farmers and Ranchers Club, a club which Russell King was instrumental in organizing. Of the 61 persons whom Russell King could recall as being members of the club in his answers to interrogatories, only 6 were non-white, although Warren County's non-white citizenry comprises 64 percent of the population. Russell King's supervisory experience consisted of supervising the work of a single agricultural technician during a portion of the two years and eight months he had been with the Extension Service. Russell King's work experience prior to his Extension work consisted largely of teaching vocational agriculture courses in high school for

approximately six years. Russell King had a B.S. degree from NCSU in Agricultural Education, and a M.S. degree in Supervision from Longwood College. Russell King had 208 hours of in-service training. Russell King represented that his work in the military service had been administrative. In Answers to Interrogatories it was disclosed that the "Administrative" duties entailed checking prisoners twice daily at a military prison and keeping the files on the prisoners - more clerical in nature than administrative.

As of March, 1982, Plaintiff had worked with the Extension Service for 33 years, 31 of which had been in Warren County, at the time of Mr. Cooper's announcement to retire.

Over the years, Plaintiff had organized numerous community clubs, organized and worked in 4-H clubs, and planned and supervised one of the most

successful programs offered by Extension in Warren County - the Expanded Food and Nutrition Education Program (hereafter "EFNEP"). Under Plaintiff's leadership, the EFNEP program had reached well over 1,000 homemakers and thousands of their family members from its inception in 1969. Over 95 percent of those reached by the EFNEP were non-whites. Plaintiff supervised a staff of four program aides, and she had supervised a staff of four program aides since 1969. She had supervised at least one employee, and generally more, during most of the years she was employed by Extension. Plaintiff had a B.S. Degree in Home Economics (Teacher Training) from the University of North Carolina at Greensboro (formerly Woman's College) and a Masters' Degree in Education from North Carolina State University. Plaintiff had taken post-Masters' Degree courses at NCSU. She had 2,192 hours of in-service training in

a vast array of subject matter ranging from food and nutrition subjects to estate planning.

(For a summary of the relative qualifications of Russell King and Emily Ballinger see A.pp. 187-222, 476-473, 236-243.)

On March 1, 1982, Hugh L. Liner had a staff meeting with the Warren County Extension Staff at which time he announced that there was to be a vacancy in the County Extension Chairmanship position, but that he did not want people to write letters on behalf of candidates, and that he did not want campaigning. (A.pp. 150, 449-451.)

Emily Ballinger spoke with Hugh L. Liner following the meeting and wrote Paul E. Dew a letter on March 9, 1982, expressing her interest in the position.

On March 3, 1982, the Warren County Young Farmers and Ranchers met. Russell King presided over the business meeting.

The purported minutes of the meeting contained an entry that "Members inquired as to the possibility of Russell King being selected as County Extension Chairman. Upon this inquiry, Russell King respectfully "denied (sic) to make any comment at that time." (Emphasis Added by Plaintiff. Affidavit of Donna B. Roope filed by Defendants, A.pp. 367-369.)

Irvin D. Smith was a member of the Warren County Young Farmers' and Ranchers' Association during 1982. Russell King either saw Irvin D. Smith or went to his farm on nine occasions between February 23, 1982, and March 29, 1982. (Russell King Answer to Interrogatory 16(d), A.pp. 365, 366.)

Defendants concede that the State Defendants received three letters in support of King - one from Irvin Smith dated March 4, 1982, one from Richard N. Gupton (a member of the Young Farmers' Organization) dated March 9, 1982, and one

from Steve L. Medlin dated March 10, 1982. (Liner Answer to Interrogatory 8, A.pp. 350, 353-362.)

Either on March 18, 1982, or a few days prior to that time, Mr. James "Jimmy" Harris, a member of the Warren County Young Farmers' and Ranchers" Organization (See Russell King Answer to Interrogatory 8, A.p. 364) contacted Chester D. Black by telephone requesting that Chester D. Black, Paul E. Dew, and Hugh L. Liner meet with Harris and other livestock producers on March 18, 1982 (this date is otherwise incorrectly referred to throughout these proceedings as a March 11, 1982, meeting in Louisburg), in Louisburg which is outside Warren County.

Emily Ballinger knew nothing of the meeting until April 2, 1982, at which time Liner casually mentioned to her in the presence of Russell King that Extension officials had met with a group of Warren County Farmers over in Louisburg over

their concern about a livestock agent, but that Plaintiff should not think that because a lot of activity was going on among the Young Farmers that this affected her chances of getting the County Chairmanship (A.pp. 421-423).

Chester D. Black, Paul E. Dew, and Hugh L. Liner attended the Louisburg meeting on March 18, 1982 (or March 11, 1982). It is noted that these individuals constituted the selection committee for recommending a successor for the County Extension Chairmanship vacancy.

There was acknowledgement by at least some of the Defendants that:

> "There was some discussion about County Extension Chairman that peripherated the meeting somewhat." (A.p. 429.)
> "The three applicants' (Mr. Koonce, Emily Ballinger, and Russell King) names were mentioned at the meeting."

On March 19, 1982, the day following the Louisburg meeting, Hugh L. Liner wrote letters to Irvin Smith, Richard Gupton,

and Steve L. Medlin acknowledging receipt of their letters in support of Russell King and thanking them for their letters. (A.pp. 350, 353-362.)

Following her receipt of a letter advising her to come for an interview and bring five copies of her resume with her, Emily Ballinger was interviewed for the position of County Extension Chairman by Black, Dew, and Liner on March 23, 1982. The opening statement of the interview, made by one of the interviewers, was an observation that the interviewer noticed that Emily Ballinger was approaching retirement age (Emily Ballinger was 55 years old at the time) and that the interviewer wanted to know why she wanted the job with its headaches. (A.p. 153.)

In virtually identical answers to Plaintiff's interrogatories, Black, Dew, and Liner justified their decision to recommend both Russell King and Emily Ballinger on the pretext that since both

met the minimum qualifications, that both should be recommended. That such is mere pretext is suggested by the fact that the third candidate, Koonce, also met the minimum qualifications, and he was not recommended.

On March 30, 1982, Emily Ballinger saw the chairman of the Warren County Commissioners in Raleigh. The Chairman of the Commissioners, W. J. "Jack" Harris, advised the Plaintiff that she would be the County Extension chairman, and that "Russell does not have the experience. " (A.pp. 373-375.)

On March 24, 1982, The Warren Record carried a letter to the Editor from Irvin Smith (A.pp. 164-167) which subtlely encouraged supporters of Russell King to let their support of him be known to the County Commissioners and others, and that the supporters appear at the County Commissioners' meeting to voice their support.

On or about March 30, 1982, a week after the deadline for resumes, a week after the interviews of the candidates, and a week after the State had purportedly made its decision, Russell King, with the approval of Liner, submitted a second resume in support of his candidacy. Plaintiff was not advised of such or given an opportunity to enlarge upon her resume. The second Russell King resume was patterned exactly after and was like the Plaintiff's, although Plaintiff had never shown her resume to Russell King. The second resume substantially enlarged upon the first resume. It was this second resume which was submitted to the County Commissioners by the State Defendants.

L. C. Cooper sent Hugh L. Liner a copy of the letter to the Editor, and Hugh L. Liner had a copy of the letter at least by March 29, 1982, at which time Emily Ballinger expressed her concern to Hugh L. Liner over the letter and her fears that

it was an unfair obstacle in her bid for the County Extension Chairmanship. (A.pp. 168-175.)

From the time of the announced vacancy until it was filled, several residents of the county spoke with Plaintiff and asked to write letters in her behalf and put in a good word for her. Plaintiff advised each that she was under orders from Defendants not to politick, or permit her supporters to politick, and that if they spoke in her behalf or wrote letters, such may be viewed as insubordination on the part of Emily Ballinger. (A.pp. 433-434, 450 - 451.)

Hugh L. Liner assured the Plaintiff that he did not interpret the letter as being related to the County Extension Chairmanship opening. (A.pp. 168-176.)

On Friday, April 2, 1982, Hugh L. Liner met with Plaintiff and Russell King and advised them that he had just talked with Mr. Harris (Defendant W. J. Harris,

Chairman of the Warren County Board of Commissioners), and that the Extension Service was going to recommend both Emily Ballinger and Russell King for the position and let the Commissioners decide. (A.p. 173.)

At this meeting with Liner on April 2, 1982, Emily Ballinger again expressed to Hugh L. Liner her concern over the letter. Hugh L. Liner lightly dismissed her concerns and explained what he purportedly thought the letter meant. (A.pp. 174-175.) Hugh L. Liner admitted that he told Plaintiff that he did not feel the letter would affect the County Commissioners' decision, and that he again reminded her and Russell King that they should not go out and politick for the position and have people appear before the Commissioners in their behalf. (A.pp. 174-175.)

The Warren County Commissioners did not request two applicants', the

Commissioners were surprised when the Extension Service indicated that it would recommend two applicants, and the County Commissioners went along with the decision of the Agricultural Extension Service to consider two applicants. (Testimony of W. J. Harris, Grievance Hearing, A.pp. 395, 402-405.)

The Warren County Commissioners met on April 5, 1982, to decide whom the Commissioners would endorse for the position of County Extension Chairman. The Extension Service was represented at the meeting by Hugh L. Liner who was present during all the discussions regarding the selection of an extension chairman.

The ability of a woman to perform the duties of County Chairman was discussed was conceeded by at least one Commissioner. The Chairman of the County Commissioners also conceeded at the grievance hearing that it was the

consensus of the Board that a man would be better in the County Extension Chairmanship than a woman (A.p. 395), and that he may have told a local citizen following the selection of King that Plaintiff would have been appointed if she were male and that he was aware of the fact that there was strong sentiment in the County for a male County Extension Chairman. (A.p. 403 - 407). The State Defendants concede that Hugh Liner was present during all of the discussion by the County Commissioners, that he was asked if there were other female chairmen and what kind of job they were doing, and that he replied that he thought there were six, and that he felt their average performance was equal to the average performance of male County Chairman in the State.

Within a few minutes following the Commissioners' meeting, Hugh L. Liner gave a prepared news release announcing Russell

King's appointment to W. J. Harris to give to the office of The Warren Record. Although Defendants contend that Liner came to Warrenton on April 5, 1982, with two news releases, one announcing the appointment of Emily Ballinger, and one announcing the appointment of Russell King, the Defendants have never been able to produce the news release purportedly prepared in the event of the selection of Emily Ballinger. (A.pp. 223 - 226, 179.)

Hugh L. Liner then orally advised Emily Ballinger that she had not received the appointment and that Russell King had been selected.

A few days after April 8, 1982, Plaintiff received a letter from Chester D. Black advising her that Russell King had been appointed.

At the time of the selection, the Extension Service had an internal Grievance Procedure which was available to the Plaintiff (A.pp. 457 - 476). The

procedure bears review by the Court.

On September 9, 1982, a hearing on the matter of Plaintiff's grievance was conducted in Warren County, and presided over by the Extension Service's Grievance Coordinator. All parties were represented by counsel, and the Extension Service and NCSU arranged for the proceeding to be recorded. Paul E. Dew, Hugh L. Liner, the Plaintiff, and W. J. "Jack" Harris (Chairman of the Warren County Board of Commissioners) testified at the hearing.

The Grievance Committee retired in private to deliberate following the hearing. (The report of their deliberations, submitted to Chester D. Black, Director of the Extension Service, by J. D. Dodson appears at A.pp. 227 - 228).

The report was not favorable to the Extension Service. By letter dated September 22, 1982, addressed to the members of the Grievance Hearing panel,

Chester D. Black rejected the report and directed the panel to reconvene. (Document 3 attached to Plaintiff's Response to Defendants' First Request for Production of Documents, A.pp. 229 - 230).

The Grievance Committee reconvened and its findings are contained in a letter from J. D. Dodson to Chester D. Black, dated October 19, 1982 (A.pp. 231 - 234).

Chester D. Black rejected the report.

Plaintiff subsequently and within apt time, filed a grievance with the EEOC.

On or about September or October, 1982, Plaintiff was given her annual Performance Review by Russell King, then County Chairman. Her review was the worst she had ever received. Plaintiff protested the review through all appropriate channels, including taking the matter up with Hugh Liner, and her protests were generally ignored (A.pp. 247 - 264).

Plaintiff filed another charge with the EEOC alleging retaliatory action on the part of Defendants in unfairly rating the Plaintiff's performance on her annual review.

On or about December 11, 1982, Plaintiff, by letters to Chester D. Black, NCSU Chancellor Poulton, and Mr. Dodson, appealed Chester D. Black's decision to Doctor Poulton, Chancellor of NCSU.

A few days after January 31, 1983, Plaintiff received a letter from Chancellor Poulton dated January 31, 1983, advising her that he would not disturb the ruling of Chester D. Black.

Plaintiff received letters from the Justice Department granting her the right to sue both the County Defendants and the State Defendants on her original claim and claim of retaliation.

This action was commenced in the United States District Court for the Middle District of North Carolina within

90 days of receipt of the letters granting Plaintiff the right to sue.

After a discovery period, the County Defendants moved for summary judgment as to all of Plaintiff's claims.

The State Defendants moved for summary judgment as to all of the Plaintiff's claims except her claim for retaliation.

By order entered May 22, 1986, the District Court allowed a portion of the County Defendant's Motion for Summary Judgment, and denied a portion. The District Court allowed the State Defendant's Motion for Summary Judgment as to all of the Plaintiff's claims (A.pp. 27 - 67).

The Plaintiff settled her claim against the county (A.pp. 486 - 495) and by Stipulation of Dismissal with prejudice filed on September 8, 1986, concluded her case with the County Defendants. (A.pp. 496 - 498.)

Plaintiff then appealed the court's interlocutory summary judgment order relating to Plaintiff's claims against the state to the United States Court of Appeals for the Fourth Circuit .

By Opinion filed on April 9, 1987, the Court of Appeals affirmed the ruling of the District Court.

ARGUMENT

1. MAY AN EMPLOYER IMMUNIZE ITSELF FROM LIABILITY FOR EMPLOYMENT DISCRIMINATION BY DELEGATING ITS EMPLOYMENT DECISIONS TO A THIRD PARTY THAT ACTS IN A DISCRIMINATORY MANNER AND WHEN THE EMPLOYER ENGAGES IN ACTS OF OMISSION OR COMMISSION WHICH RESULT IN THE THIRD PARTY'S ACTING IN A DISCRIMINATORY MANNER?

The Plaintiff has contended throughout these proceedings that the State Defendants had the final word on who was appointed Warren County Extension Chairman. The Defendants and the lower courts rejected this contention, holding that there was no rejection of the Plaintiff by the State Defendants. Under an interpretation of the facts most favorable to the State Defendants, at the

very least the decision regarding County Extension Chairman appointments was a joint one - one in which the State could not act without the concurrence of the County, or the County without the concurrence of the State.

The basic premise upon which the District Court and the Appeals Court based its decision that summary judgment on Plaintiff's Title VII and ADEA claims was proper and the basis upon which the courts concluded that Plaintiff had failed to make a prima facie showing was that the Plaintiff was not rejected by the State Defendants since they recommended her for the Warren County Extension Chairmanship (A.p. 18). The trial and appellate courts therefore ignored, rejected, and resolved in the State Defendants favor all evidence offered by the Plaintiff of actions and inactions on the part of the State Defendants which were designed to and did undermine the Plaintiff's bid for the

County Extension chairmanship.

The issue of whether an organization in the education business, staffed by highly educated and knowledgeable persons can insulate itself from liability for the discrimination of third parties (local county Boards of Commissioners consisting of farmers, factory workers, and persons who are unknowledgeable of EEOC regulations) with whom it jointly participates in making employment decisions begs to be addressed by the highest court of this country.

If the evidence before the court is taken in light most favorable to the State Defendants, the selection process for a County Extension chairman required the mutual consent of the state and the county. The State Defendants contend that since they consented to the County Defendants' considering the Plaintiff for the position, that the County Defendants' rejection of the Plaintiff on grounds of

sex discrimination may not be imputed to the State Defendants. For the United States Supreme Court to license this thinking by declining to review this case is to say to employers that if they can somehow manage to successfully arrange for a third party to participate in employment decisions which affect the mutual employee of the employer and the third party, that the employer is totally relieved of all responsibility under Title VII. Further, that this is the case even when, as in this case, the Extension Service was fully aware of the impermissible sex based considerations which went into the decision of the County Commissioners.

Hugh L. Liner attended the County Commissioners' meeting at which time the Commissioners made a decision regarding their preference of County Extension chairman. The chairman of the county commissioners testified in the grievance hearing (A.pp. 395, 403 - 404) that gender

was the reason Miss Ballinger did not get the position.

Under the State Defendants' contention of the manner in which County Extension chairman were selected, the decision required the mutual consent of the state and county. It is respectfully submitted that the State Defendants had a duty to withdraw their consent to the rejection of Miss Ballinger by the County when the State Defendants knew, or in the exercise of even ordinary care they should have known, the county half of the selection to be tainted by gender and age discrimination discrimination. Under no interpretation of the procedure could it be concluded that the State Defendants were required to accept the selection of the County Defendants. In fact, under the Memorandum of Understanding to which the State and County Defendants were parties, all appointments are worked out jointly between the Extension Service and the

commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy. (A.pp. 312 - 320.)

The State Defendants have found themselves a loophole by which they may continue their historic and statistically documented discrimination against females (and blacks). As the District Court's and Fourth Circuit Court of Appeals Decisions now stand, that loophole has been approved by the Courts.

A ruling by the Supreme Court on this issue is important to the Plaintiff, and to all other employees of the State Defendants (and other employees similarly situated) who are subject to gender, race, and age discrimination at the hands of the State Defendants and their scapegoats - the 100 counties in North Carolina.

The Court is urged to pick up where Bazemore v. Friday, supra, left off, and to address this important issue.

The Plaintiff was the most qualified of the applicants for the position of County Extension chairman. The act of the State Defendants' recommending a less qualified 34 year old male along with the Plaintiff when the Plaintiff possessed superior qualifications and when the county had not requested two applicants (the Chairman of the Board of Commissioners was surprised that two names would be submitted to the commissioners; in fact, he had told the Plaintiff on March 30, 1982, that she would be the next County Extension chairman) is evidence of "rejection" even though the state Defendants permitted the county commissioners to consider the Plaintiff for the position.

2. SUMMARY JUDGMENT ON PLAINTIFF'S TITLE VII CLAIMS AGAINST THE STATE DEFENDANTS WAS INAPPROPRIATE BECAUSE GENUINE ISSUES OF MATERIAL FACT WERE RAISED BY THE PLEADINGS AND EVIDENCE BEFORE THE COURT, AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT DECISION DISMISSING PLAINTIFF'S TITLE VII CLAIMS AGAINST THE STATE DEFENDANTS.

The trial court correctly concluded that Title VII cases are governed by the following statement of law:

> "The Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established an order of presentation of proof for use in Title VII cases involving disparate treatment. The Plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. at 802; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Specifically, a Plaintiff must show that the Plaintiff was a member of a protected class who was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253; Cuthbertson v. Bigger Brothers, Inc., 702 F.2d 454, 458 (4th Cir. 1983). The burden of establishing a prima facie case is not an onerous one. Burdine, 450 U.S. at 253."
>
> "Once a Plaintiff establishes a prima facie case, the burden of production shifts to the Defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection, thereby rebutting the presumption of discrimination raised by the Plaintiff's prima facie case. McDonnell Douglas Corp. v. Green, 411 U.S. at 802; Ross, 759 F.2d at 365. The Defendant successfully rebuts

this presumption by producing evidence that the Plaintiff was rejected, or someone else preferred, for a legitimate, non-discriminatory reason. Id. To satisfy this burden, the employer need not persuade the Court that it was actually motivated by the proferred reason -- the employer's explanation must merely be legally sufficient to raise a genuine issue of fact as to whether it has discriminated against the Plaintiff. Like the burden of establishing a prima facie case, this burden of production is not an onerous one."

"Finally, if the employer produces a legitimate, non-discriminatory explanation for the employee's rejection, the employee bears the ultimate burden of proving intentional discrimination by producing evidence that the employer's proferred reasons are pretextual. Burdine, 450 U.S. at 253. This burden of production merges with the ultimate burden of persuading the Court that the employee has been the victim of intentional discrimination. Id. at 256. The employee may satisfy his burden of persuasion either directly by persuading the Court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proferred explanation is not credible. Id. Because the first two burdens of production in the McDonnell Douglas formula are not difficult to satisfy, Courts often resolve Title VII and ADEA cases on this third ground."
Summary judgment motions are less

likely to be granted in Title VII and ADEA cases given the need to determine the employer's actual motive. Where the nonmoving party on motion for summary judgment would at trial carry the burden of proof, such party is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts resolved favorably to him, most favorable of possible alternative inferences from evidence drawn in his behalf and to be given the benefit of all favorable legal theories invoked by evidence so considered. Summary judgment is not appropriate even if there is no dispute as to evidentiary facts but only as to conclusions to be drawn therefrom. Summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of claims. Charbonnages de France v. Smith, 597 F.ed 406, 414 (4th Cir. 1979); Pierce v. Ford

Motor Co., 190 F.2d 91, 9150 (4th Cir. 1951); United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Foster v. Swift & Co., 615 F.2d 701 (5th Cir. 1980).

It is clear that the Court's decision to allow the State Defendants' Motion for Summary Judgment was based in large measure upon the Court's conclusion that since the State Defendants "recommended" the Plaintiff, there could be no "discrimination" on the part of the State Defendants. This position ignores the fact that the evidence gives rise to the presumption that the recommendation was ceremonial, that it was undermined by the State Defendant's acts and omissions, and that the evidence creates the inference that the ultimate decision for "acceptance" or "rejection" was either entirely the State Defendants, or part the State Defendants and the State Defendants "rejected" the Plaintiff. Even if the

final decision were not with the State Defendants as they argued on appeal, under the State Defendants' description of the selection process, the selection required mutual consent, and that consent could presumably be withdrawn by the State Defendants when it became apparent to them or should have become apparent to them that the county's decision was tainted by discrimination. This "rejection" was tangible - not something to be devined from inferences, and it, along with statistical evidence which was totally disregarded by the Court, and other factual evidence established a prima facie case of sex discrimination contrary to the findings of the Court.

Statistical data has been held as sufficient to establish a prima facie showing of discrimination. Hazelwood School District v. United States, 433 US 299, 53 L.Ed 2d 768, 97 S Ct 2736 (1977).

The Court attempted to piecemeal resolve in the State Defendants' favor evidence of various actions on the part of the State Defendants which Plaintiff contended to constitute evidence of discriminatory intent. In so doing, the Court missed the fact that the totality of the occurrences and events left little doubt that the occurrences were motivated by sex and age discrimination.

In Woodworkers v. Plywood, 659 F.2d 1259, the Court was faced with a situation similar to that of the Plaintiff in that Plaintiffs had been victimized by a series of occurrences, any single one of which might have been dismissed as insufficient to establish that Plaintiffs had been the victims of sex and race discrimination, except for the fact that the totality of the occurrences and events left little doubt that the occurrences and events were motivated by sex and race discrimination.

Plaintiff in this case not only offered direct proof of discrimination based on hard cold facts, she also submitted circumstantial proof, and the Courts in this circuit have held circumstantial evidence sufficient. In Holsey v. Armour, 743 F.2d 199 (4th Cir. 1984), the Court found a pattern and practice of discrimination based on circumstantial evidence indicating improper motive. There the Court (at page 209) relied on U.S. Postal Service v. Aikens, 103 S.Ct. 1478 (1983) for the following:

> "To act deliberately, of course, requires intent. But direct evidence of intent is unnecessary. Circumstantial proof suffices ." Id. 1481, n.3.

If an employer, as the State Defendants, initially insulates itself from liability for discrimination of an employee by agreeing that the employee may be considered for a position by a third party which participates in employment

decisions, does the employer continue to be insulated from liability when the employer engages in acts of omission or commission which insure that the employee will not be selected by the third party?

The position of the Plaintiff throughout these proceedings was that the State Defendant's "recommendation" (more accurately, an agreement to permit the county commissioners to consider the Plaintiff for the position) to the Board of Commissioners was merely ceremonial - done with the intent of avoiding liability for discrimination charges the State Defendants believed the Plaintiff would bring, and that the State Defendants engaged in activities which virtually assured that the Plaintiff would not be selected by the Board of Commissioners.

Both the District Court and the Court of Appeals ignored facts favorable to the Plaintiff, and resolved all genuinely disputed material facts in favor of the

State Defendants. In so doing, the courts completely ignored the Supreme Court's clear directives on numerous occasions regarding standards the court must apply in determining whether or not summary judgment is appropriate. This issue was most recently addressed by the Court in Anderson v. Liberty Lobby, Inc., 477 US _____, 91 L Ed 2d 202, 106 S Ct 2505 (1986), in which the court held summary judgment will not lie if the dispute about a material fact is "genuine," and if the evidence is such that a reasonable jury could return a verdict for the non-moving party. The court further held that at the summary judgment stage, the trial judge's function is not to himself weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. While holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions, the

court cautioned that its ruling did not denigrate the role of the jury, that it was not authorizing trial on affidavits, and that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The court reaffirmed the Adickes v S.H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 (1970) standard that on motion for summary judgment the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

As applied to this case:

1. Could not a jury reasonably conclude from the evidence of the relative qualifications of the Plaintiff and the 34 year old male recommended to the Board of Commissioners that the Plaintiff was more qualified than the male, and that the State Defendants' refusal to recommend only the Plaintiff was indicative of

discriminatory animos? The question is answered by the grievance panel jury which reasonably concluded on essentially the same evidence before the trial court that:

> "One of the basic reasons for the complaint was that two people were recommended rather than one. The panel recommends that in the future only the most qualified person be recommended to the commissioners." (A.p. 231.)

> "The panel felt that the Extension Administration either knew or had a strong feeling as to who would be selected if both Emily and Russell were recommended to the Commissioners. They felt that the recommendation of Emily was most likely an attempt by the Administration to prevent Emily from filing a grievance or at least to put the blame on the County Commissioners if there was a grievance filed. By recommending both people, the Administration avoided making a choice between the two individuals." (A.p. 232.)

> "There was testimony to the fact that the Chairman of the County Commissioners had led Miss Ballinger to believe that he thought she would be the next County Extension Chairman by comments he made to Miss Ballinger at a meeting in Raleigh that he attended. The

> Chairman of the County Commissioners also testified that he was surprised when Extension recommended two applicants for the position. This testimony plus the fact that George Koonce, who the panel felt met the minimum qualifications, was not recommended, led the panel to wonder if the Administration knew who would be selected and recommended Miss Ballinger to ward off a grievance by her." (A.p. 234.)

2. There was evidence that after the State Defendants decided to recommend both the Plaintiff and Russell King to the County Commissioners that Russell King submitted a new resume (patterned after the Plaintiff's resume, although she had never shown Russell King her resume), and that it was this expanded new resume was submitted by the State Defendants to the county. The evidence lent itself to two interpretations. The Court chose to believe Hugh L. Liner's version and find that there was nothing irregular about an employee's updating his resume. The Grievance panel "jury" having heard Hugh

L. Liner's testimony nevertheless reasonably concluded from the evidence:

> "The fact that Russell King altered his resume and there was no evidence that Miss Ballinger was given an opportunity to update her resume could be interpreted to mean that the Administration had a preference for Mr. King." (A.p. 232.)

3. There was evidence before the Court that the Extension Service personnel who would decide whom to recommend to the county commissioners met outside Warren County with a group of Warren County farmers on March 18, 1982. There was also evidence in the form of the testimony of Hugh Liner that the subject of the County Chairman "somewhat peripherated the meeting" (A.p. 429). If Hugh Liner's testimony is completely ignored by the court, then the court might conclude from this evidence that the Plaintiff has no complaint about the State Defendant's attendance at the meeting. On the other hand, the entirely reasonable conclusion

of the grievance panel "jury" upon hearing the testimony of Hugh Liner and Paul E. Dew was:

> "The Extension Service should have recognized the fact that the meeting in Louisburg with a group of farmers would have been viewed as a pressure group. The panel felt that it may have been better judgment on the Administration's part to have not met with that group during the time that a Chairman was being selected." (A.p. 233.)

4. There was evidence that there was an apparent misconception on the part of some farmers in Warren County that the County Extension Chairman would have to be a man in order for the County to get a livestock agent. There was also evidence in the form of testimony of the chairman of the county commissioners, W. J. "Jack" Harris at the grievance hearing that the County Commissioners, with Hugh Liner in attendance as the Extension Service representative, considered the sex of the Plaintiff as a basis for rejecting her.

There was also evidence from Hugh L. Liner that he was asked during the meeting about the ability of a woman to perform the duties of county chairman. His reply was that there were six female county chairman, and that their average performance was equal to the average performance of males.

In granting summary judgment for the State Defendants, the District Court and Court of Appeals concluded that the only inference to be drawn from this evidence was that the State had nothing to do with the admitted discrimination by the county Defendants, and that the state was justified in doing nothing more to enforce the EEOC protections its employee, Miss Ballinger, allegedly had.

The grievance panel "jury" nevertheless reasonably concluded from virtually the same evidence that was before the District Court that:

"The panel felt that the Warren

> County people thought that the Chairman had to be a man in order for them to have a livestock agent. There was no evidence brought out that indicated that the Administration did anything to point out that this was not necessarily the case." (A.pp. 232 - 233.)
> "The Administration should give some thought as to things that could be done to dispel the conception that a lot of county lay people seem to have that the duties of a County Chairman are such that a man needs to be the County Chairman." (A.p. 2..)

5. There was evidence before the court: That the Extension Service had instructed all of the applicants for the position that they were not to "politick" for the position or have their supporters do so; that the Plaintiff became alarmed over a mounting campaign for the appointment of Russell King and that she expressed her concern to Hugh L. Liner; and that Hugh L. Liner assured her that she should not be concerned and continued the "gag" order as to Miss Ballinger, even though at the time he made the assurances

and continued the "gag" order he had received three letters from supporters of King, (A.pp. 353 - 362) he had attended a meeting in Louisburg at which a discussion regarding the County Chairman "peripherated" the meeting, and he had been provided with a copy of a letter to the Editor of the Warren County newspaper which could be interpreted to be an endorsement for Russell King (A.pp. 432 - 445). There was also evidence that on March 3, 1982, at the Young Farmers' Organization, presided over by Russell King, that members had discussed what could be done to get Russell King to be the next county chairman and that Russell King had "denied" (sic) (A.pp. 367 - 368) to comment.

In allowing the State Defendant's motion for summary judgment the court effectively said that the only reasonable inference to be drawn from this evidence is that the State Defendants had

recommended the Plaintiff to the Commissioners; therefore, any acts of omission or commission were harmless and did not lend themselves to an interpretation that the State Defendants had engaged in any discriminatory act.

A jury could reasonably find from the evidence that the State Defendants gagged the Plaintiff to ensure that she would not be selected, and that this was merely further evidence that the State Defendants' "recommendation" was a sham.

6. There was evidence before the court of a statisically documented pattern of discrimination against women and persons over forty for the position of County Extension Chairman (A.pp. 321 - 343). The District Court ignored the evidence and the Court of Appeals, incredibly, found it not to exist. It is noted that this was the same type of statistical data rejected by the trial court and court of appeals in the Bazemore

case, and evidence which the Supreme Court held the court of appeals to have erred in failing to consider. Bazemore v. Friday, supra.

7. The undisputed evidence was that the State Defendants rejected the findings of its own grievance panel, directed the panel to reconsider its decision, and then rejected the "reconsidered" findings rendered by the panel. The trial and appellate courts disregarded this undisputed evidence, although it was evidence which a jury might reasonably have concluded supported a finding that the State Defendants were at least jointly responsible for employment decisions in which there was participation by the counties and under one interpretation of the evidence, that the state had the final word on employment decisions.

8. The Plaintiff alleged in her complaint, and there was evidence to support the allegation, that the State

Defendants had retaliated against the Plaintiff for filing an EEOC charge. The State Defendants did not address this issue in the District Court in their motion for summary judgment or brief, although the court allowed the State Defendants Motion for Summary Judgment as to all claims and dismissed the action as to the State Defendants. A reasonable inference to be drawn from the evidence was that Plaintiff was given her worst performance reviews ever in retailiation for her having filed a discrimination charge.

3. SUMMARY JUDGMENT WAS IMPROPER AS TO PLAINTIFF'S ADEA CLAIM AGAINST THE STATE DEFENDANTS.

The rules governing production of proof in Title VII cases are equally applicable in age discrimination cases. See Lovelace v. Sherwin-Williams co., 681 F.2d 230, 238 (4th cir. 1982).

The Court held that the Plaintiff's ADEA claim against the State Defendants

must fail, because in the Court's opinion Plaintiff had not shown that she had been rejected by the State Defendants for the position and had not shown that the dual recommendation was a sham used to cover up a discriminatory intent (A.pp. 57 - 59).

As heretofore argued in this petition, the Plaintiff was "rejected" by the State Defendants in that the final decision regarding the appointment was that of the State Defendants. If the final decision was not with the State Defendants, then the decision was one involving mutual consent which the State Defendants could have and should have withdrawn.

The first question asked the Plaintiff by the State Defendants at her interview was why she wanted the job, since she was so near retirement age (A.p. 153). The question was clearly inappropriate and was indicative of the state of mind of the interviewers with

reference to Plaintiff's age and must be considered with all other evidence of age discrimination which the Court simply ignored.

That age was a consideration of the State Level Defendants in selecting County Extension Chairman is supported by statistical evidence. (A.pp. 321 - 343.)

4. THE COURT ERRED IN ALLOWING THE STATE DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR CONSPIRACY.

A careful review of the Plaintiff's Complaint (A.pp. 69 - 143) establishes that under the rules of notice pleading she articulated a cause of action for common law conspiracy as well as alleging entitlement to recovery under 42 USC 1985 for conspiracy.

The Court of Appeals affirmed the District Court's dismissal on grounds that there was no proof before the court of participation in any conspiracy by the State Defendants, and that summary judgment was appropriate.

A reasonable inference to be drawn from the evidence before the court was that the Plaintiff's "recommendation" was a sham, and that it was done with the intention of insulating the State Defendants from liability for discrimination charges they felt would be brought by the Plaintiff if she were not selected for the position. To insure that the Plaintiff would not be selected, Defendants engaged in conduct which a jury might reasonably find to have indicated that the State Defendants were attempting to ensure that the County would not indicate a preference for the Plaintiff.

The standard which the court should have applied to the evidence was not whether or not the State Defendants denied a conspiracy, but rather whether or not a jury might reasonably find from the evidence that a conspiracy existed.

5. SUMMARY JUDGMENT WAS INAPPROPRIATE ON PLAINTIFF'S CLAIM UNDER 42 USC 1983 AND THE COURT ERRED IN DISMISSING PLAINTIFF'S

CLAIM.

The Court dismissed Plaintiff's claim under 42 USC 1983, on the erroneous basis that Plaintiff had failed to establish a Title VII or ADEA claim and that the Section 1983 must therefore be dismissed since Plaintiff's claim was predicated on the theory that her statutory rights had been violated.

For reasons set forth elsewhere in this petition, that presumption on the part of the Court was error.

6. THE COURT'S GRANTING OF THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CAUSE OF ACTION AND DISMISSAL OF THE ACTION WAS ERROR.

The errors of the District Court in allowing Plaintiff's Motion for Summary Judgment as to the Breach of Contract Claim and in dismissing the claim were several fold:

a. The Court erroneously characterized the Plaintiff's breach of contract claims against the state as relating only to those of an alleged third party beneficiary to the contract;

b. The Court erred in its findings and conclusions that the Plaintiff was not a third party beneficiary to the Memorandum of Understanding; and

c. The Court erred in its conclusions that Plaintiff had failed to show any breach of contract by discriminatory practices.

The Court's narrow characterization of Plaintiff's breach of contract action as being related only to whatever rights the Plaintiff might have under the "Memorandum of Understanding" was error. (See Plaintiff's complaint, A.pp. 135 - 138)

It is clear from the evidence which was before the Court that the Plaintiff's employers represented themselves to be equal employment opportunity employers, (A.pp. 244 - 247) and that her employers had agreed to treat Plaintiff and all other employees fairly in promotions and other benefits of employment. These procedures and standards formed a part of Plaintiff's contract with the Defendants.

Thus, when the Defendants elected to throw their own announced standards of "fair play" to the wind and to deny Plaintiff, or conspire to see that Plaintiff was denied, the appointment as Warren County Extension Chairman, the action constituted a breach of Plaintiff's contract of employment with the Defendants.

Further, Plaintiff submits that she was a third party beneficiary to the "Memorandum of Understanding" between the State Defendants and the County. The Court held that Plaintiff was a stranger to the contract and, therefore, could not recover (A.pp. 66 - 67). If Plaintiff and other employees were not the intended beneficiaries of the "Memorandum of Understanding," it is difficult to know exactly who were the beneficiaries. The Memorandum of Understanding was clearly designed to distinguish the responsibilities of each of the employers,

the State and the County, with reference to the appointment and means of compensating the mutual employees of each.

Nevertheless, even if the Plaintiff were not a third party beneficiary to the Memorandum of Understanding, her allegations of breach of contract should not have been dismissed on Summary Judgment. The totality of the circumstances supported the existence of a contract between the Plaintiff and Defendants containing assurances that fairness would be applied to employment decisions, and that the Defendants would not engage in impermissible discriminatory practices under Title VII and ADEA.

The Court's ruling was totally unrelated to the position taken by the State Defendants in their brief filed in support of their Motion for Summary Judgment.

Obviously, a Plaintiff cannot be expected to anticipate that the Court will

issue summary judgment against the Plaintiff based upon a theory first advanced in the Court's order allowing the summary judgment.

7. THE COURT ERRED WHEN IT IGNORED AND DISMISSED PLAINTIFF'S CLAIM OF RETALIATION AGAINST HER BY THE STATE DEFENDANTS ARISING FROM HER FILI .G OF AN EEOC GRIEVANCE.

The Court completely ignored and diregarded Plaintiff's claim of retaliation except to lump it with all other claims and dismiss it even in face of no evidence by the defendants to dispute it. Questions of retaliation are particularly inappropriate for summary judgment disposition, since the primary issue is one of intent and motive, Romero v. Union P. Railroad, 615 F2d 1303 (10th Cir. 1980).

The Defendants did not address the issue of Plaintiff's retaliation claim, and, based upon the evidence before the Court, summary judgment should have been granted the Plaintiff on the issue rather

than the Defendant, since there was no issue of material fact incident to the claim.

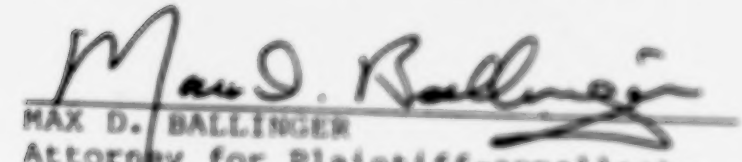
CONCLUSION

The Supreme Court should take this opportunity to enter a definitive ruling regarding the responsibility of an employer for the discriminatory acts of third parties with whom it participates in employment decisions.

The standards applied by the District Court and Court of Appeals in granting the State Defendant's Motion for Summary Judgment is contrary to the standards set by the Supreme Court in the cited and numerous other cases. The Supreme Court should terminate the practice of District Courts and federal Appeals Courts of using summary judgment as a means for resolving disputed material facts in favor of a moving party on motion for summary judgment in employment discrimination cases.

This the 8th day of July, 1987.

Respectfully Submitted:



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Decision and Order of the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 86-2142

EMILY RUTH BALLINGER

Plaintiff - Appellant

v.

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE, NORTH CAROLINA STATE UNIVERSITY; BOARD OF WARREN COUNTY COMMISSIONERS; WARREN COUNTY; HUGH L. LINER, CHESTER D. BLACK, PAUL E. DEW, RUSSELL G. KING; individually and as Agents of NCAES and NCSU; BRUCE R. POULTON, individually and as Chancellor of NCSU; W. J. HARRIS, CLYDE R. EDWARDS, WILLIAM T. SKINNER, III, HERBERT C. HARRIS, GEORGE E. SHEARIN, SR., individually and as Warren County Commissioners; GLENWOOD NEWSOME, individually and as Agent of Board of Warren County Commission and OTHER CO-CONSPIRATORS here unnamed, individually

Defendant - Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (CA-84-193-5)

Argued Mar. 2, 1987, Decided Apr. 9, 1987

Before HALL, and WILKINS, Circuit Judges,

and TIMBERS, United States Circuit Judge for the Second Circuit, sitting by designation.

Max Dewey Ballinger for Appellant; Edwin Marion Speas, Jr., Special Deputy Attorney General, North Carolina Department of Justice (Lacy H. Thornburg, Attorney General on brief) for Appellees.

TIMBERS, Circuit Judge:

Emily Ruth Ballinger ("appellant") appeals from a judgment entered May 22, 1986 in the Eastern District of North Carolina, Terrence W. Boyle, District Judge, which granted summary judgment in favor of appellees North Carolina State University, North Carolina Agricultural Extension Service, Chancellor Bruce R. Poulton, Dr. Hugh L. Liner, Dr. Chester D. Black, Dr. Paul E. Dew and Russell C. King ("appellees") in an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. (1982); the Age Discrimination in Employment Act, 29 U.S.C. Section 621 et seq. (1982 & Supp. III 1985); 42 U.S.C. Section 1985

(1982); 42 U.S.C. Section 1983 (1982); and a pendent breach of contract claim.1

1/ At the commencement of this action appellant named various state and local government agencies, officers and employees as defendants. Both the state-level and the local-level defendants moved for summary judgment. The motion of the state-level defendants was granted in its entirety, while the motion of the county-level defendants was granted in part and denied in part. Following this ruling, appellant and the local-level defendants entered into a settlement of the case as it applied to them. On September 8, 1986 appellant and the local-level defendants filed a stipulation of voluntary dismissal with prejudice as to all of appellant's claims against the local-level defendants. Appellees in the present case, therefore, are the state-level defendants and consist of: North Carolina State University; The North Carolina Extension Service; Chancellor Bruce R. Poulton, Dr. Chester D. Black, Director of the Extension Service; Dr. Paul E. Dew, Assistant Director of the Extension Service; Dr. Hugh L. Liner, District Extension Chairman for the North Central District; and Russell G. King, County Extension Chairman, Warren County.

The court held that appellant had failed to establish a prima facie case of discrimination based on sex, and, accordingly, was barred from bringing a claim under Title VII. The court also held that appellant had failed to establish a prima facie case of age discrimination under the Age Discrimination in Employment Act ("ADEA"). The court further held that appellant did not have standing to assert a conspiracy claim pursuant to Section 1985(3) because she was not a member of a class to which the provisions of that statute applied. The court dismissed appellant's Section 1983 claim because the claim was predicated upon the erroneous assumption that her statutory rights had been violated. Finally, the court dismissed the pendent breach of contract claim, holding that appellant was not an intended third-party beneficiary to the contract between the State and the Warren County

Board of County Commissioners.

On appeal appellant argues: first, that there is a genuine issue of material fact as to whether appellant established a prima facie case of discrimination based on sex; second, that there is a genuine issue of material fact as to whether appellant established a prima facie case of discrimination based on age; third, that appellant is a member of a class protected by Section 1985 and the court therefore erred in dismissing that claim; fourth, that, because there are genuine issues of material fact as to discrimination based on sex and age, the dismissal of appellant's Section 1983 claim was error; and, fifth, that the court erred in its determination that appellant was not a third-party beneficiary to the contract.

We hold that there are no genuine issues of material fact as to whether appellant established a prima facie case

of discrimination under either Title VII or ADEA. Summary judgment therefore was appropriate. We also hold that appellant has not made a particularized showing of participation in a conspiracy as required by Section 1985. We have considered appellant's remaining claims of error and have concluded that they are without merit.

We affirm.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

The North Carolina Extension Service ("Extension Service") is a division of the School of Agriculture and Life Sciences of North Carolina State University ("NCSU"). The Extension Service provides agricultural, home economics and other similar services to the people of the State. There are local extension programs in all 100 counties of North Carolina.

At the county level, the supervisor of the local Extension Service is called the County Extension Chairman ("County Chairman"). When a vacancy exists for a County Chairman position the District Extension Chairman meets with the Board of County Commissioners ("the County Board") for the county affected to discuss the qualifications required for the County Chairman for that particular county. A vacancy announcement is then circulated, requesting that qualified persons apply for the position.

Written applications are received and screened by employees of the Extension Service in order to determine which applicants possess the qualifications believed necessary. The applicants selected are then scheduled for interviews.

The interviews are conducted by the Director of the Extension Service, the Associate Director, the Assistant Director

for County Operations and the District Extension Chairman for the affected county. These persons develop through consensus a recommendation for presentation to the County Board. The County Board then interviews the person or persons recommended and makes the final hiring decision.

The process established by the Extension Service for filling county chairman positions was followed in selecting the County Chairman for Warren County, the position at issue in the present case. 2

2/ The only deviation was in the membership of the screening panel. Since the position of Assistant Director of County Operations was vacant in 1982, appellant was interviewed by three persons instead of four.

In February 1982 L. C. Cooper, the County Chairman for Warren County, announced his plans to retire from that position. At the time of Cooper's announcement appellant was employed by the Warren County Extension Service as the Home Economics Extension Agent. She was a fifty-five year old white female and had been employed by the Warren County Extension Service for approximately thirty one years. Russell King was a co-worker of appellant who had been employed by the Warren County Extension Service as an Associate Agricultural Extension Agent for approximately two years. King was a thirty-four year old white male, Both appellant and King applied for the position vacated by Cooper.

On March 16 Dr. Dew wrote to both appellant and King informing them that they were to be interviewed on March 23 by the screening panel. This panel, composed of Dr. Dew, Dr. Black and Dr. Liner,

interviewed both applicants on that date. At the conclusion of the interviews the screening panel determined that, subject to the county Board's willingness to accept a dual recommendation, it would recommend both appellant and King for the position. On March 30 Dr. Liner inquired of the County Board whether it would accept two recommendations from the screening panel. Dr. Liner refused to reveal the identities of the favored applicants. On April 2 the County Board advised Dr. Liner that it had agreed to receive two recommendations for consideration.

On April 5 the County Board met in executive session and interviewed appellant and King. Dr. Liner attended the interviews as a representative of the Extension Service. During the meeting, but prior to any final decision, a member of the County Board asked Dr. Liner how many women were serving as County Chairman

and about the relative performances of males and females. Dr. Liner indicated that there were six or seven women serving and he understood their average performance to be the same as the average performance of males.

At the conclusion of the interviews the County Board selected King as the Warren County Extension Chairman. Dr. Liner issued a press release announcing King's selection.

Shortly after the announcement appellant filed a grievance pursuant to the personnel policy of the Extension Service. On September 9 a panel was convened to take evidence. The panel found the appellant had been discriminated against on the basis of sex and age. The panel further found that the discrimination had been unintentional. Dr. Black, in his position as Director of the Extension Service, rejected the panel's report and asked it to reconvene

for the purpose of making specific factual findings as to the discrimination. The panel reconvened on October 18 and made findings and recommendations. The panel stated that its findings were based on appellant's evidence in view of the lack of any contrary evidence submitted by the Extension Service. On November 15 Dr. Black again rejected the report of the panel. This rejection was ratified by Chancellor Poulton on January 31, 1983.

At the same time that she initiated the grievance procedure, appellant filed a claim of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") which issued a right-to-sue letter on December 9, 1983.

The letter was issued by EEOC without making its own findings. 3/

3/ Appellant filed a second claim with EEOC in October 1982 after receiving a poor Performance Review. In this claim she alleged that the poor review was in retaliation for both the filing of her grievance and the initial claim filed with EEOC. A right-to-sue letter with respect to this claim was issued by EEOC on December 9, 1983. EEOC made no findings of its own as to this claim. The district court did not specifically address the retaliation issue in its opinion. Nevertheless, a review of the entire record leads us to conclude that the claim is without merit.

On March 8, 1984 the instant action was commenced. The complaint alleged violations of Title VII, ADEA. Section 1983 and 1985 of the Civil Rights Act and a pendent breach of contract claim. On March 29, 1985 appellees moved for summary judgment. On May 22, 1986 the motion was granted as to all of appellant's claims. This appeal followed.

For the reasons stated below we affirm the order and judgment of the district court granting summary judgment in favor of appellees.

II.

(A) Standard of Review

The standard that an appellate court applies in reviewing an order which grants summary judgment is the same as that which governs the district court's initial action under Fed. R. Civ. P. 56(c). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. The facts, and the inferences to be drawn from the facts, must be viewed in the light most favorable to the party opposing the motion. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). We have emphasized repeatedly the drastic nature of the summary judgment remedy and have held that it should not be granted unless it is perfectly clear the there are no genuine issues of material fact in this case. Pierce v. Ford Motor Co., 190 F. 2d 910, 915 (4th Cir.), cert denied, 342 U.S. 887 (1951). Further, since "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense," Charbonnages de France v. Smith, 597 f.2d 406, 414 (4th Cir. 1979), courts must take special care in cases such as the instant one because motive is often the critical issue in employment discrimination cases. Nevertheless,

"[t]he fact that motive is often the critical issue in employment discrimination cases does not mean that summary judgment is never an appropriate vehicle for resolution." International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F. 2d 1259, 1272 (4th Cir. 1981) (emphasis in original). This is so because "... the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986) (emphasis in original). We apply these principles to the instant case.

(B) The Title VII Claim

The Supreme Court repeatedly has set forth the controlling legal standards with respect to the burden of producing

evidence in a Title VII disparate treatment case such as this one:

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' ... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)). These standards, which allocate evidentiary burdens, serve to sharpen and focus the presentation of proof in all Title VII cases.

In order to establish a prima facie case of employment discrimination based on gender, appellant must have demonstrated,

by a preponderance of the evidence, that she was a member of a protected class who was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination. Burdine, supra, 450 U.S. at 253. In granting summary judgment in favor of appellees, the district court concluded that appellant failed to adduce sufficient evidence to establish a prima facie case because she was not rejected by appellees. Rather, the screening panel recommended her for the Warren County chairmanship. The court further held that there were no circumstances which gave rise to an inference of a discriminatory animus. Thus, we must determine whether the grant of summary judgment here at the prima facie stage was precipitous. We answer the inquiry in the negative.

Appellant recognizes that the dual recommendation to the County Board in and of itself, was not discriminatory. She

argues, however, that such recommendation was merely a ploy to escape liability under Title VII. She asserts that she has set forth adequate circumstances from which we should infer discriminatory intent. In effect, appellant invites us to disregard the fact the she was not rejected, but was recommended, for the promotion. We decline appellant's invitation.

In Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1983), we held that a plaintiff may establish her discrimination case in either of two ways: first, through direct evidence of discrimination or, second, through the cumulative effect of indirect evidence of her employer's motivation. It is beyond cavil that there was no direct evidence of discrimination in the instant case. Our review of the factors which appellant contends are sufficient indirect evidence of discriminatory motivation leaves us

with the firm conviction that there was no indirect evidence of discrimination based on gender in this case. For example, appellant contends that it was "statistically documented" that the Extension Service discriminates against women, but she failed to produce the statistical evidence. She then claims that we may infer discriminatory motivation from the fact that Dr. Black, Dr. Dew and Dr. Liner "attended a political caucus in support of Russell King." Appellant offered no concrete evidence to support this conclusory allegation. In contrast, appellees produced sworn statements that the meeting was for the legitimate purpose of discussing a livestock agent for Warren County, and that a part of the duties of these three individuals required them to meet with farmers to discuss the farmers' various requirements. Appellant next claims that appellees permitted King to

file a second resume in support of his candidacy from which we should infer a discriminatory intent. The second resume, however, was submitted after the decision to recommend both appellant and King to the County Board already had been made. Finally, appellant claims that the grievance committee's finding of discrimination created a genuine issue of material fact, precluding summary judgment. Appellant, however, attempts to gloss over the second finding of the grievance committee, namely, that the discrimination was unintentional. There is no support in that report for her claim of inferred discriminatory intent. The additional factors asserted by appellant similarly are without merit.

We hold that appellant did not offer evidence sufficient to defeat summary judgment at the prima facie stage.

(C) The ADEA Claim

We have held that the substantive elements of an ADEA claim "are (a) that an employee covered by the Act (b) has suffered an unfavorable employment action by an employer covered by the Act (c) under circumstances in which the employee's 'age was a determining factor' in the action in the sense that "'but for" [her] employer's motive to discriminate against [her] because of [her] age, [s]he would not have suffered the action.'" Lovelace, supra, 681 F.2d at 238 (quoting Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir. 1981)).

The standards relating to the burdens and order of proof in Title VII cases apply as well to cases arising under ADEA. In analyzing appellant's ADEA claim, the district court held that appellant had failed to establish a prima facie case of age discrimination because she was not rejected by appellees for the position she sought nor had she demonstrated, through

sufficient evidence, that the dual recommendation was a sham to cover up a discriminatory intent. We agree.

Appellant asserts as the foundation of her ADEA claim a question allegedly posed to her by a member of the screening panel at her initial interview. At that interview Dr. Black purportedly remarked to appellant, "from looking at this resume you are getting near or in the range of retirement." He then asked, "Why do you want the job of Extension Chairman with all the headaches, etc? I'm not in any way suggesting that you retire." Appellant wishes us to infer a discriminatory animus from this question. We decline to do so. Whatever negative consequences such a question might have in another context is open to speculation. In the instant case the question simply had no adverse impact on the decision of the screening panel because that panel recommended appellant to the County Board.

Likewise, the record in this case is devoid of any evidence from which to infer that "but for" her age, appellant would have been the only individual recommended for the promotion.

We hold that appellant failed to establish a prima facie case of discrimination under ADEA.

(D) The Conspiracy Claim Under 42 U.S.C. Section 1985(3)

The surviving version of Section 2 of the Civil Rights Act of 1871, 42 U.S.C. Section 1985(3), prohibits two or more persons from conspiring to deprive another of equal protection of the laws of of equal privileges and immunities under the laws. The district court dismissed appellant's claim brought pursuant to Section 1985(3) on appellees' motion for summary judgment both on the ground that appellant was not a member of a protected class within the coverage of Section 1985(3) and on the ground that the alleged

deprivation of a right created by Title VII could not be the basis for a claim under Section 1985(3). Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366 (1979).

We find it neither necessary or appropriate to rule on the issue of appellant's standing under Section 1985(3), for we agree with the dismissal on other grounds.

Quite simply, there is not proof, direct or indirect, of participation in any conspiracy by these appellees. Instead, appellant relies solely on the bare allegations of her complaint.

> "It is well settled that mere allegations of conspiracy, backed up by no factual showing of participation in a conspiracy, are insufficient to support such an action against a motion for summary judgment based on affidavits establishing the absence of any participation."

Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985).

A review of the affidavits submitted

by appellees in support of their motion for summary judgment convinces us that the affidavits amply dispel the notion of any participation in the conspiratorial acts alleged by appellant in her conclusory manner.

The inquiry we must make is "...whether the evidence presents a sufficient disagreement to require submission to a jury whether it is so one-sided that one party must prevail as a matter of law". Anderson v. Liberty Lobby, Inc., supra, 106 S. Ct. at 2512. We find no evidence requiring submission to a jury on the issue of conspiracy.

We hold that the district court correctly granted summary judgment to appellees on appellant's Section 1985(3) claim.

We have considered the remaining claims of error and have concluded that they are without merit.

III.

To summarize:

We hold that the district court correctly held that appellant failed to establish a prima facie case of employment discrimination based on gender pursuant to Title VII; and that the district court correctly held that appellant failed to establish a prima facie case of employment discrimination based on age pursuant to ADEA. We also hold that the district court correctly dismissed appellant's claim brought pursuant to 42 U.S.C. Section 1985(3).

AFFIRMED

Decision and Order of
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 84-193-CIV-5

EMILY RUTH BALLINGER,)
Plaintiff)
)
)
v.)
)
NORTH CAROLINA AGRICULTURAL)
EXTENSION SERVICE; NORTH)
CAROLINA STATE UNIVERSITY)
et al,)
Defendants)

Decided May 21, 1986 Filed May 22, 1986

The plaintiff brings suit alleging age and sex discrimination and the violation of rights protected by the Constitution and laws of the United States, and state law. The defendants have moved for summary judgment under Rule 56 if the Fed. R. Civ. P.

The defendants are: North Carolina State University, the North Carolina Agricultural Extension Service, Hugh L. Liner, Chester D. Black, Paul E. Dew, Russell C. King and Bruce R. Poulton

[hereinafter "the state defendants"]; and, Warren County, the Warren County Board of Commissioners, W. J. Harris, Clyde R. Edwards, William T. Skinner, III, Herbert C. Harris, George E. Shearin, Sr. and Glenwood Newsome [hereinafter "the county defendants"]. The defendants have been sued in their individual and official capacities.

The plaintiff alleges:

(1) That the state and county defendants intentionally discriminated against her on the basis of her age and sex, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. SS 626(b), 623 et seq, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., respectively;

(2) That the state and county defendants conspired to deprive the plaintiff of the equal protection of the laws in violation of the U. S.

Constitution and 42 U.S.C. Section 1985(3);

(3) That the state and county defendants deprived plaintiff of rights secured to her by the Constitution and laws of the United States in violation of 42 U.S.C. Section 1983, and

(4) That the state and county defendants breached their contract with plaintiff under which they promised equal opportunity for promotion for all employees regardless of age and sex.

This court has federal question subject matter jurisdiction over plaintiff's first three claims by virtue of 28 U.S.C. SS 1331 and 1343. Additionally, the court asserts its pendent jurisdiction over the fourth claim, a state law claim. For the reasons that follow, the plaintiff fails to establish a prima facie case if age discrimination against either the county or state defendants. The plaintiff also

fails to establish a prima facie case if sexual discrimination against the state defendants. The plaintiff's evidence does overcome the county defendants' motion for summary judgment on her Title VII claim. Summary judgment is denied on plaintiff's Section 1983 claim against the county defendants. On all of the remaining claims against all defendants, summary judgment is allowed.

I.

Plaintiff Emily Ruth Ballinger was a fifty-five year old female employee of the North Carolina Agricultural Extension Service at the time the allegedly discriminatory acts took place. Ballinger had been employed by the Extension Service for a number of years as a Home Economics Extension Agent.

In February, 1982, L. C. Cooper, Warren County's Extension Chairman, announced plans to retire effective May 1st of that year. Both the plaintiff and

defendant Russell King, who was a thirty-four year old white male at the time of the alleged discriminatory acts, applied for the Extension Chairmanship position. Both the plaintiff and defendant King were interviewed on March 23, 1982 by defendants Black, Dew and Liner.1/

1/ Applicants for the position of Extension Chairman in a particular county must apply in writing and are then selected for interviews by Extension Service staff. persons selected for interviews are interviewed by the Director of the Extension Service (defendant Black), the Associate Director (defendant Dew), the Assistant Director for County Operations (vacant in March, 1982), and the District Extension Chairman for the county involved (defendant Liner). this panel examines the credentials of applicants for strengths and weaknesses and develops group consensus recommendations for the board of County Commissioners in the county where the Extension Chairmanship vacancy is located. The Board of County Commissioners then interviews the persons or persons recommended by the Extension Service. For a detailed description of the extension Service's hiring and appointment procedures, see Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).

The screening panel decided to recommend both the plaintiff and defendant King to the Warren County Board of County Commissioners, subject to the Board's agreement to accept two recommendations. On March 30, 1982, defendant Liner requested permission from the County Commissioners to submit two names to the Board. Liner refused to identify which names were to be submitted. On April 2, 1982, the County Commissioners agreed to receive two names from the Extension staff for consideration.

On April 5, 1982, the Board of County Commissioners met in executive session to select an Extension Chairman. Defendant Liner attended this meeting on behalf of the Extension Service. The Board selected defendant King as the new Warren County Extension Chairman. Defendant Liner issued a press release shortly thereafter announcing King's selection.

Plaintiff followed this decision with

a grievance pursuant to the Extension Service's personnel policy. A four-member panel, which the Extension Service and plaintiff jointly chose, accepted plaintiff's allegations of age and sex discrimination. The panel found the discrimination to be unintentional. Defendant Black, as Director of the Extension Service, rejected these findings and asked the panel to reconvene to make specific findings as to discrimination. The panel reconvened on October 18, 1982, and made findings and recommendations which were again rejected by defendant Black. The panel noted in its findings that its decision was made almost entirely on the plaintiff's evidence since the Extension Service did not present contrary evidence.

Plaintiff brought a charge of employment discrimination with the Equal Employment Opportunity Commission within 180 days of the commission of the alleged

offenses pursuant to 42 U.S.C. Section 2000e-5(e). The plaintiff has satisfied the jurisdictional prerequisites to maintaining this action.

Plaintiff relies on the following forecast to create material facts in dispute. If plaintiff's evidence is insufficient to present such contested material facts, then summary judgment will be appropriate. Plaintiff claims that:

1. Statistics purportedly reveal years of discrimination against females and persons over the age of forty regarding appointment to County Extension Chairmanships between the years 1974 and 1982;

2. The extension Service staff, i.e., defendants Black, Dew and Liner, failed to notify county officials and residents of Warren County that if plaintiff were selected as Extension Chairman they would still get a livestock agent appointed to their county;

3. During plaintiff's screening interview, defendant Black questioned the plaintiff regarding her reason for seeking the county chairmanship at at time when she was eligible for retirement;

4. The Warren County Board of County Commissioners did not expect the screening panel to recommend two candidates because such dual recommendations are unusual;

5. The Extension staff allowed Russell King to submit a second, up-dated resume following his screening interview;

6. The Extension staff and the Board of County Commissioners received numerous letters supporting Russell King for the Extension Chairmanship, despite the fact that both King and the plaintiff were under instructions not to "politik" for the position. Plaintiff's supporters heeded her request to not contact state and county officials on her behalf, thereby giving the appearance that she lacked the broad support which King

enjoyed;

7. The screening panel attended a meeting on March 16, 1982 in Louisburg, North Carolina. The meeting was called by farmers and included a number of individuals from the Warren County Young Farmers, an association started by defendant Russell King;

8. Defendant Liner failed to instruct the Board of County Commissioners at its April 5, 1982 executive session that it could not consider an applicant's sex in selecting the Warren County Extension Chairman;

9. County Commission Chairman W. J. Harris stated that, had plaintiff been a male, she would have gotten the position as Extension Chairman, and

10. The grievance hearing panel found that plaintiff was probably rejected on account of unintentional age and sex discrimination, and defendant Black subsequently rejected these findings.

II.

A. Plaintiff's Title VII Claims

The Supreme Court has created rules designed to govern the allocation of burdens and order of presentation of proof in a Title VII case. United States Postal Service Board of Governors v. Aikens, 105 S. Ct. 1478, 1483 (1983). These rules governing the production of evidence also apply in a summary judgment context. See, e.g., Ross v. Communications Satellite Corp., 759 F.2d 355, 364-66 (4th Cir. 1985).

The Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established an order of presentation of proof for use in Title VII cases involving disparate treatment. The plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. McDonnell Douglas Corp., 411 U.S. at 802; Texas Department of Community Affairs v.

Burdine, 450 U.S. 248, 252-53 (1981). Specifically, a plaintiff must show that the plaintiff was a member of a protected class who was qualified for an available position but was rejected under circumstances giving rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253; Cuthbertson v. Bigger Brothers, Inc., 702 F.2d 454, 458 (4th Cir. 1983). The burden of establishing a prima facie case is not an onerous one. Burdine, 450 U.S. at 253.

Once a plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection, thereby rebutting the presumption of discrimination raised by plaintiff's prima facie case. McDonnell Douglas Corp., 411 U.S. at 802; Ross. 759 F.2d at 365. The defendant successfully rebuts this presumption by producing evidence that the

plaintiff was rejected, or someone else preferred, for a legitimate, non-discriminatory reason. Id. To satisfy this burden, the employer need not persuade the court that it was actually motivated by the proffered reason--the employer's explanation must merely be legally sufficient to raise a genuine issue of fact as to whether it has discriminated against the plaintiff. Like the burden of establishing a prima facie case, this burden of production is not an onerous one.

Finally, if the employer produces a legitimate, nondiscriminatory explanation for the employee's rejection, the employee bears the ultimate burden of proving intentional discrimination by producing evidence that the employer's proffered reasons are pretextual. Burdine, 450 U.S. at 253. This burden of production merges with the ultimate burden of persuading the court that the employee has been the

victim of intentional discrimination. Id. at 256. The employee may satisfy his burden of persuasion either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is not credible. Id. Because the first two burdens of production in the McDonnell Douglas formula are not difficult to satisfy, courts often resolve Title VII and ADEA cases on this third ground.

The court recognizes that summary judgment motions are less likely to be granted in Title VII and ADEA cases given the need to determine the employer's actual motive. Care is required in deciding whether the evidence presents a genuine issue of motive because summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of claims. Ross, 759 F.2d at 364, quoting Charbonnages de

France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

Summary judgment may be used in Title VII and ADEA litigation where appropriate. See Ross, 759 F.2d at 365. See also International Woodworkers of America, AFL-CIO, CLC v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1272 (4th Cir. 1981) ("fact that motive is often the critical issue in employment discrimination cases does not mean that summary judgment is never an appropriate vehicle for resolution."). Summary judgment is appropriate in instances in which no genuine issue of fact exists. Ross, 759 F.2d at 364. In short, if a defendant can show there is no reasonable possibility of plaintiff's proving at trial that the employer's proffered reasons for rejection are mere pretexts, summary judgment in the latter's favor is appropriate. Mason v. Continental Illinois National Bank, 704 F.2d 361, 366 (7th Cir. 1983).

1. State Defendants

The plaintiff does not meet her burden to forecast a prima facie case of discrimination against the state defendants. There was no showing of a rejection by these defendants nor of any circumstances giving rise to unlawful discrimination. Burdine, 450 U.S. at 253.

While courts have altered the test enunciated in McDonnell Douglas to fit the particular facts of individual cases, all prima facie tests require that the plaintiff be a member of a protected class who was qualified for a position but rejected under circumstances giving rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253. Rather than a rejection, plaintiff's evidence shows that the state defendants recommended her for the position she sought . The county defendants, and not the state defendants, rejected the plaintiff.

Plaintiff admits that the recommendation of two candidates by the state defendants, standing alone, does not evidence a discriminatory intent. However, plaintiff claims that the ten points set out earlier in this opinion constitute conduct from which the court can infer a discriminatory animus. The court finds this argument to be without merit.

The plaintiff's ten points do not raise an inference of unlawful discrimination. The court will briefly address these events raised by the plaintiff in support of her Title VII claim against the state defendants:

(1) There is no evidence that county officials erroneously assumed Warren County would not receive a livestock agent if plaintiff was selected as Extension Chairwoman. Affidavits filed by the state defendants indicate that defendants Liner, Black and Dew explained to farmers at the

Louisburg meeting on March 11th that Warren County would receive a livestock agent regardless of who was selected the County Extension Chairman.

(2) Occasionally more than one person is recommended by the Extension Service to a County Board to fill a vacancy. This is an accepted practice although frequently only one name is submitted to fill a vacancy. The state selection process allows for County Commissioners to select between the candidates when more than one applicant for a County Extension Chairmanship is recommended. Plaintiff concedes that the fact that more than one name was recommended is not discrimination on its own. Testimony at the grievance hearing established that defendant Liner refused to reveal to the County Commissioners the names of the two individuals recommended by the Extension Service. This contradicts plaintiff's claim that the

dual recommendation of plaintiff and King was a sham. 2/

2/ Plaintiff alleges that the state defendants recommended her along with King only to escape liability in case she brought suit. Plaintiff acknowledges that the state defendants knew she felt she had been "cheated" out of the Extension Chairmanship three years earlier. Such speculation as to the state defendants' motive, even if true, does not establish plaintiff was rejected because of her sex. A recommendation based on a fear of litigation cannot be equated with a recommendation intended to conceal sexual discrimination. The ultimate question in a Title VII action goes to whether vel non an employer intentionally and unlawfully discriminated in its hiring or promotional procedures.

(3) The state defendants' unrebutted affidavits indicate that applicants are routinely allowed to update their resumes following a screening interview. There are no facts before the court to support plaintiff's allegations that the state defendants' decision to allow King to submit an up-dated resume was part of a scheme to reduce the plaintiff's chances of being selected Warren County Extension Chairman.

(4) Likewise, there is no evidence to support plaintiff's conclusory allegations that the state defendants encouraged King's supporters to "politik" for him while simultaneously discouraging plaintiff's supporters from overtly supporting her. There are also no facts before the court indicating that the March 11, 1982 meeting in Louisburg was a political rally for King, as plaintiff claims it was. Defendants Liner, Black and Dew have filed affidavits stating that

the Extension Chairmanship selection process was discussed tangentially as it impacted on the county's ability to procure a livestock agent. Plaintiff's speculation that this meeting constituted a rally for King is based primarily on the fact that many of King's supporters were present at the meeting. Since King started the Warren County Young Farmers, and since the Louisburg meeting was for the benefit of farmers, the presence of King's supporters at the meeting is hardly surprising or incriminating. Moreover, the plaintiff was not even aware the meeting had occurred until defendant Liner himself brought it to her attention.

(5) Plaintiff has failed in any way to support her allegation that the state did not properly advise the Board of County Commissioners that consideration of an applicant's sex was an improper one. In fact, the evidence indicates that defendant Liner, in response to a question

from a Commissioner, replied that female extension chairmen performed as well as male chairmen. Whatever the County Commissioners' reasons for rejecting the plaintiff, there are no facts before the court indicating that the state defendants were aware of, or approved, the Board's allegedly improper basis for rejecting the plaintiff.

(6) The court finds the findings of the grievance panel to be legally insignificant as they relate to this case. First, there is a presumption against administrative collateral estoppel in antidiscrimination suits. Rosenfeld v. Department of the Army, 769 F.2d 237, 239 (4th Cir. 1985). Since the grievance hearing decision was not affirmed by a state court, that ruling is not entitled to preclusive effect under 28 U.S.C. Section 1738. Id. at 240-241. Second, the panel explicitly found that the state defendants had unintentionally

discriminated against the plaintiff. This finding, if any, is detrimental to plaintiff's cause of action. Third, the panel's findings were based on evidence produced in a relatively informal forum, without benefit of formal evidentiary and trial protections. Fourth, the panel explicitly mentioned that they accepted plaintiff's allegations at face value, given the lack of any evidence to the contrary.

Plaintiff has failed to produce evidence that the state defendants' actions toward her were motivated by a discriminatory animus. Therefore, the court need not prescribe a prima facie test for use in cases wherein an employee who was recommended, rather than rejected for a position, claims that the rejection was actually a ploy which the employer conceived to insulate itself from liability under Title VII. While plaintiff does allege that the state

defendants' dual recommendation was a ploy which they conceived for this very purpose, she has not produced facts to support this bald, conclusory allegation. Her accusation that the state and county defendants conspired together to discriminate against her by means of the dual recommendation is likewise unsubstantiated by direct or circumstantial evidence.

To establish a genuine issue of fact, the evidence "must create fair doubt; wholly speculative assertions will not suffice." Ross, 759 F.2d at 364. Given lack of evidence creating fair doubt, the state defendants' motion for summary judgment as to plaintiff's Title VII claim is ALLOWED. The facts presently before the court clearly reveal that the state defendants' actions towards the plaintiff during the Extension Chairman selection process do not allow for an inference of discriminatory intent. Plaintiff has not

made a prima facie showing of sexual discrimination on the part of the state defendants.

2. County Defendants

Plaintiff has, however, successfully established a prima facie case if sexual discrimination against the county defendants. She has shown herself to be a member of a protected class who was qualified for the position of Extension Chairman but nonetheless was rejected by the county defendants. Moreover, the position which plaintiff sought was not abolished and a member of a non-protected group was selected in her place. See Holmes v. Bevilacqua, 774 F.2d 636, 639 4th cir. 1985).

However, the county defendants have responded by articulating legitimate, non-discriminatory reasons for plaintiff's rejection. The county defendants cite plaintiff's lack of training in agricultural matters, her poor interview

during the Board's April 5 session, plaintiff's poor evaluation by fellow employees and her overall lack of leadership abilities as reasons for selecting King. Defendants also cite King's strong record and positive interview before the Board of County Commissioners. The plaintiff has admitted that she experienced some difficulty in answering questions during her interview before the Board and that she was not trained in agricultural matters. She further admits that she was given poor evaluations by fellow Extension Service employees, but attributes these poor reviews to personal pettiness. Based on these facts, the court finds that the county defendants have met their burden of articulating legitimate, non-discriminatory reasons for plaintiff's rejection.

Therefore, the central issue regarding this claim against the county

defendants is whether plaintiff has successfully shown that the defendants' proffered explanation for her rejection is a mere pretext. The court finds that the plaintiff has succeeded in making a showing of pretext.

The testimony of the Chairman of the Warren County Board of Commissioners, W. J. Harris, at plaintiff's grievance hearing raises a genuine issue as to whether plaintiff was rejected by the Board on account of her sex. Harris testified that it was the Board's consensus that a man was better suited for the position of Extension Chairman than a woman and that he may well have told a Warren County citizen that plaintiff would have been selected for the position had she been a man. These statements are direct evidence of discriminatory intent and provide a sufficient showing to rebut the county defendants' proffered explanation for plaintiff's rejection. 3/

3/ Given the statements of W.J. Harris, which constitute direct evidence of discriminatory intent, the court could discard the McDonnell Douglas burden-shifting scheme and find under ordinary principles for assessing conflicting evidence of motivation find that a genuine issue of material fact exists as to the county defendant's motives for rejecting the plaintiff. Holmes v. Bevilacqua, 774 F.2d 636, 638, 639 n. 5 (4th Cir. 1985); Sui v. Johnson, 748 F.2d 238; Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 240 (4th Cir. 1982). Use of the McDonnell Douglas tests further illustrates that plaintiffs have adduced sufficient evidence to defeat the county defendants' motion for summary judgment.

B. ADEA Claim

The plaintiff has failed to make any showing that she was discriminated against on account of her age. There are no facts before the court suggesting that the county defendants rejected plaintiff on account of her age, even though defendant Harris did admit that gender had been a consideration in her rejection.

The rules governing burdens of production in Title VII cases are equally applicable in age discrimination cases. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982). Even assuming plaintiff established a prima facie showing of age discrimination, the county defendants' reasons for rejecting her, as described above, do provide legitimate, non-discriminatory explanations for her rejection. Plaintiff therefore must produce evidence either attacking the credibility of county defendants' explanations or showing that,

as against the defendants' specific reasons, "age" is a more likely explanation for her rejection. Lovelace, 681 F. 2d at 238. Plaintiff has not produced evidence of this sort. There are no facts before this court presently suggesting that the county defendants rejected plaintiff on account of her age, even though defendant Harris did admit that plaintiff's gender had been a consideration in rejecting her as County Extension Chairman. Given plaintiff's failure to produce evidence showing that the county defendants' articulated non-discriminatory reasons for her rejection are pretextual, her ADEA claim against the county defendants must be dismissed.

The plaintiff's ADEA claim against the state defendants must fail for the same reason her Title VII claim against those defendants failed; she was not rejected by the state defendants for the

position she sought and has not shown that the dual recommendation was a sham used to cover up a discriminatory intent. Moreover, the event upon which plaintiff rests her ADEA claim against the state defendants does not allow for an inference of discriminatory intent. Plaintiff alleges that a question asked by defendant Black at her initial screening interview evidences a discriminatory animus based on age. At that interview, defendant Black purportedly asked plaintiff why she wanted the County Extension Chairmanship with all its attendant "headaches" when she was so close to retirement age. Plaintiff responded by stating that she had no intention of retiring. There is no indication in the record that plaintiff's age was ever mentioned again or considered by any defendant following this conversation.

Clearly this showing is not sufficient to establish a prima facie case

of age discrimination. Black's question does not show that it is "more likely than not" that the state defendants discriminated against plaintiff on account of her age. Once again, plaintiff's claim against the state defendants fails to uncover circumstances giving rise to an inference of unlawful discrimination. Her ADEA claim against the state defendants must therefore be dismissed.

Remaining Claims

Plaintiff has also brought Section 1985(3) and Section 1983 claims against the state and county defendants, as well as a breach of contract claim against both sets of defendants. Plaintiff's Section 1985(3) claim should be dismissed.

Section 1985(3) prohibits two or more persons from conspiring for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws. This section requires a racial or class-based

animus. Block v. Dotson, No. 85-2009, slip op. at 4 (4th Cir. May 2, 1986). As the Supreme Court recently noted, "It is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and... Republicans." United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 836 (1983). Given this restrictive interpretation of Section 1985(3) by the Court, "it is doubtful that the expansive view of the statute reflected in [earlier] cases could be considered of continuing precedential reliabilty." Buschi v. Kirven, 775 F.2d 1240, 1258 (4th Cir. 1985). Only those classes who are, in terms of enforcement of their rights, in "unprotected circumstances similar to those of victims of Klan violence" are within Section 1985(3)'s scope of protection. Id. ,quoting Scott, 463 U.S. at 851 (Blackmun, J., dissenting).

Given these higher courts' reluctance

to interpret Section 1985(3) broadly, this court is required to interpret the statute in a similarly narrow fashion. As plaintiff's class is based on her age and gender, the animus allegedly motivating the conspiracy in this case does not implicate the protections of Section 1985(3). See Block, slip op. at 15 (denying Section 1985(3) claim to orphans for similar reasons). Plaintiff therefore does not possess standing to bring a Section 1985(3) claim against the state and county defendants. See Leaf Tobacco Exporters Association v. Block, 749 F.2d 1106 (4th Cir. 1984). 4/

4/ Even if Ballinger did possess standing to sue under Section 1985(3), the court would dismiss the bulk of her claim on alternative grounds. The court has already dismissed Ballinger's ADEA claim as to all defendants. Therefore, she can base her Section 1985(3) claim only on alleged violations of Title VII. However, a plaintiff cannot invoke Section 1985(3) to seek redress for alleged violations of Title VII. Great American Savings & Loan Association v. Novotny, 442 U.S. 366

(1979). Accordingly, plaintiff's entire Section 1985(3) would fail, even had she possessed standing to sue under the statute.

Plaintiff's Section 1983 claim against North Carolina State University must be dismissed because that entity is a state agency entitled to Eleventh Amendment immunity. See Mayberry v. Dees, 663 F.2d 502, 504-05 (4th Cir. 1981). Plaintiff's claim must be dismissed as to the remaining state defendants as well. Plaintiff's Section 1983 claim is predicated upon the assumption that her statutory rights were violated: she has not produced any evidence that the state defendants violated her constitutional rights but instead relied in her written brief submitted in support of her Section 1983 claim on alleged violations of her federal statutory rights. Given the court's ruling that plaintiff has failed to establish a Title VII or ADEA claim against any state defendant, her Section

1983 claim against all state defendants must be dismissed in its entirety.

The county defendants argue that the plaintiff cannot demonstrate that they violated her constitutional or statutory federal rights entitling plaintiff to Section 1983 relief. However, the court has previously found that a genuine issue of material fact exists regarding plaintiff's Title VII claim. the court lacks sufficient information to determine whether the county defendants' actions constituted official policy or custom or whether qualified immunity is applicable in this case. In the present circumstances, the county defendants' motion for summary judgment regarding plaintiff's Section 1983 claim must be denied.

The county defendants do not enjoy Eleventh Amendment protection. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The county

defendants argue that the plaintiff cannot demonstrate that they violated her constitutional or statutory federal rights entitling plaintiff to Section 1983 relief. However, the court has previously found that a genuine issue of material fact exists regarding plaintiff's Title VII claim. the court lacks sufficient information to determine whether the county defendants' actions constituted official policy or custom or whether qualified immunity is applicable in this case. In the present circumstances, the county defendants' motion for summary judgment regarding plaintiff's Section 1983 claim must be denied.

Plaintiff's final claim is that she is the third-party beneficiary to a contract between the state and county defendants which was subsequently breached. 5/ Plaintiff claims that this contract, entitled a Memorandum of Understanding, was breached by all defendants when she was discriminated against on account of her gender and age.

5/ Actual parties to this memorandum were the North Carolina Agricultural Extension Service and the North Carolina State and A&T State Universities on the one hand and the applicable Board of County Commissioners on the other hand.

Plaintiff's contract claim must fail because she cannot be deemed a third-party beneficiary to this contract. The agreement is between the state and individual Boards of County Commissioners. A stranger to a contract may sue under that contract as a third-party beneficiary only if the parties to the agreement intended that the third-party receive a benefit therefrom which could be enforced in court. Certain-teed Products Corp. v. Sanders, 264 N.C. 234 (1965). The explicit purpose of this agreement is to assure that "both elected and appointed officials of each level of government understand their respective responsibilities and relationships...." There is no evidence whatsoever that the agreement was entered into to provide Extension Service Agents with benefits which could be enforced in courts of law. The plaintiff cannot sue under the Memorandum of Understanding, and her

contract claim against the state and county defendants must be dismissed.

The court also notes, as an alternative grounds for dismissal against the state defendants, that the plaintiff has failed to show any breach of contract by means of discriminatory practices.

To summarize, the court makes the following ruling:

1. The motion of the state defendants for summary judgment is GRANTED as to all state defendants as to all of the plaintiff's claims, i.e., plaintiff's Title VII, ADEA, Section 1985(3), Section 1983 and breach of contract claims;

2. The county defendants' motion for summary judgment as to plaintiff's ADEA claim is GRANTED;

3. The county defendants' motion for summary judgment as to plaintiff's Section 1985(3) claim is GRANTED;

4. The county defendants' motion for summary judgment as to plaintiffs' breach

of contract claim is GRANTED;

5. The county defendants' motion for summary judgment as to plaintiffs' Title VII claim is DENIED; and

6. The county defendants' motion for summary judgment as to plaintiff's Section 1983 claim is DENIED.

SO ORDERED this 21st day of May, 1986.

s/TERRENCE W. BOYLE

UNITED STATES DISTRICT COURT JUDGE

Complaint and Request for Admissions
filed by Plaintiff on
March 8, 1984 in the

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

EASTERN DIVISION

Civil Action Number: 84-193-CIV-S

EMILY RUTH BALLINGER,

Plaintiff,

versus

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE; NORTH CAROLINA STATE UNIVERSITY; BOARD OF WARREN COUNTY COMMISSIONERS; WARREN COUNTY; HUGH L. LINER, Individually and as Agent of the North Carolina Agricultural Extension Service and North Carolina State University; CHESTER D. BLACK, Individually and as Agent of The North Carolina Agricultural Extension Service and North Carolina State University; PAUL E. DEW, Individually and as Agent of the North Carolina Agricultural Extension Service and North Carolina State University; RUSSELL C. KING, Individually and as Agent of the North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners; BRUCE R. POULTON, Individually and as Chancellor of North Carolina State University, W. J. HARRIS, Individually and as Warren County Commissioner; CLYDE R. EDWARDS, Individually and as Warren County Commissioner; WILLIAM T. SKINNER, III, Individually and as Warren County

Commissioner; HERBERT C. HARRIS, Individually and as Warren County Commissioner; GEORGE E. SHEARIN, SR., Individually and as Warren County Commissioner; GLENWOOD NEWSOME, Individually and as Warren County Manager, as Agent of the Board of Warren County Commissioners and as Agent of Warren County; and OTHER CO-CONSPIRATORS here unnamed;

Defendants.

COMPLAINT

and

REQUEST FOR ADMISSIONS

PLAINTIFF, complaining of the defendants, alleges, and, pursuant to the provisions of Rule 36 of the Federal Rules of Civil Procedure, requests and demands that the defendants admit, the following:

FIRST CAUSE OF ACTION

Plaintiff, complaining of the defendants as a first cause of action, alleges:

1

This is a suit:

a. In equity and otherwise

authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 USC 2000e et sequentia,

b. Authorized and initiated under the provisions of Section 7(b) of the Age Discrimination in Employment Act (ADEA), 29 USC 626(b), 29 USC 623 et sequentia,

c. Instituted pursuant to 29 USC 216(b),

d. Instituted pursuant to 29 USC 217,

e. For declaratory relief pursuant to 28 USC 2201 and 28 USC 2202

f. Instituted under the provisions of Title VII of the Civil Rights Act of 1964, 42 USC 1983 et sequentia,

g. Instituted pursuant to 42 USC 1985 et sequentia, and

h. For breach of contract.

Jurisdiction of this Court is invoked pursuant to:

a. 42 USC 2000e-2(a)(1),

b. 42 USC 2000e-2(a)(2),

c. 42 USC 2000e-5

d. 28 USC 1337,

e. 29 USC 216(b)

f. 29 USC 217

g. 28 USC 1343(1)

h. 28 USC 1343(2)

i. 28 USC 1343(3)

j. 28 USC 1343(4),

k. 29 USC 623(a)(1),

l. 29 USC 626(b)

m. 29 USC 626(c)

n. 29 USC 623(d),

o. 42 USC 1983, and

p. 42 USC 1985.

Declaratory relief is sought under 28 USC 2201 and 2202.

Jurisdiction of this Court is invoked:

a. To secure protection of and to redress deprivation of rights secured by 42 USC section 2000e et sequentia providing for relief against sex discrimination in employment,

b. To redress deprivation of rights secured by 29 USC 623 et sequentia providing for relief against age discrimination in employment,

c. To redress deprivation of due process procedural due process rights to which the plaintiff was entitled under the circumstances,

d. To redress deprivation of rights secured by 42 USC 1983 et sequentia, providing for relief against violation of ones civil rights, and

e. To redress deprivation of rights secured by 42 USC 1985 et sequentia, providing for relief for one who has been damaged pursuant to a conspiracy to have one's rights guaranteed by the Constitution of the United States of America violated.

4

All conditions precedent to jurisdiction under 42 USC 2000e-2(a)(1) and 42 USC 2000e-2(a)(2), have occurred or been complied with, including, but not limited to, the following:

a. Charges of employment discrimination were filed with the Equal Employment Opportunity Commission within 180 days of the commission of the unfair employment practices.

b. Notifications of Right to Sue were received from the United States Justice Department on

December 12, 1983, by the plaintiff's attorney. A copy of these notifications are appended hereto as "Exhibit A" and "Exhibit B".

c. This complaint has been filed within 90 days of receipt of the Notifications of Right to Sue.

5

All conditions precedent to jurisdiction under 29 USC 623(a)(1) and 29 USC 623(d) have occurred or been complied with, including, but not limited to, the following:

a. A charge alleging unlawful discrimination was filed with the Equal Employment Opportunity Commission on September 21, 1982, and within 180 days of the commission of the unfair employment practice;

b. The Equal Employment Opportunity Commission informed the

prospective defendants named in the charge of the charge.

c. The Equal Employment Opportunity Commission failed to effect voluntary compliance with the requirements of the Age Discrimination in Employment Act.

d. More than 60 days has elapsed since plaintiff filed her charge of unlawful discrimination with the Equal Employment Opportunity Commission.

6

Plaintiff is a white female born December 3, 1926, and citizen and resident of Warren County, North Carolina. Plaintiff simultaneously maintains residence in the Guilford College Community, Guilford County, North Carolina.

At all times alleged herein, plaintiff was an employee (within the

meaning of 42 USC 2000e-2(a), 29 USC 623(a), 29 USC 623(d), and other) of defendants:

The North Carolina Agricultural Extension Service
North Carolina State University
Warren County, and
the Board of Warren County Commissioners

in accordance with the arrangement set forth in the attached "Memorandum of Understanding" identified as Exhibit C.

This "Memorandum of Understanding" is hereby incorporated into and made a part of this paragraph of this complaint by reference.

Plaintiff had been so employed by these defendants for 33 years at the time of the acts alleged herein and plaintiff had the position of Home Economics Extension Agent.

Plaintiff was at all times complained of in this complaint an aggrieved party

and an "employee" within the meaning of 42 USC 2000e(f) and 29 USC 630(f).

7

Defendant North Carolina Agricultural Extension Service is a part of the School of Agriculture and Life Sciences of North Carolina State University by Federal and State legislation for the specific purposes of "extending" the educational service of the University to the people of the State of North Carolina on subjects relating to agriculture, home economics, 4-H and youth, community development, and natural resource development.

8

Defendant North Carolina State University is an 1862 Land Grant University which is a part of the Consolidated University System of the State of North Carolina.

9

Defendant Warren County is a county within the State of North Carolina.

10

Defendant Board of Warren County Commissioners is the elected board of officials elected by the registered voters of Warren County to govern the affairs of Warren County, North Carolina.

11

Defendants North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners are all parties to a "Memorandum of Understanding" which sets forth the duties and responsibilities and the division of duties and responsibilities between these parties.

A copy of the "Memorandum of Understanding" is appended hereto as Exhibit C, and is hereby incorporated into and made a part of this paragraph of this complaint by reference.

12

Defendant Hugh L. Liner is a citizen and resident of Wake County, North Carolina.

Defendant Hugh L. Liner was at all times alleged herein the District Chairman of the North Carolina Agricultural Extension Service for the District which includes Warren County, and he was and is an employee of North Carolina State University.

13

Defendant Chester D. Black is a citizen and resident of Wake County, North Carolina.

Defendant Chester D. Black was at all times alleged herein the Director of the North Carolina Agricultural Extension Service, and he was and is an employee of North Carolina State University.

14

Defendant Paul E. Dew is a citizen and resident of Wake County, North

Carolina.

Defendant Paul E. Dew was at all times alleged herein the Associate Director of the North Carolina Agricultural Extension Service, and he was and is an employee of North Carolina State University.

15

Each of defendants Hugh L. Liner, Chester D. Black, and Paul E. Dew at all times alleged herein acted under color of State and Local governmental authority, and:

a. Individually, and, plaintiff is informed and believes, and therefore alleges,

b. As agent, servant, and employee of, and at all times under color of his employment by the North Carolina Agricultural Extension Service and North Carolina State University, and

c. As a co-conspirator with other

named defendants and unnamed co-conspirators in a scheme to deprive plaintiff of rights guaranteed to her under Title VII of the Civil Rights Act of 1964, under the Constitution of the State of North Carolina (particularly Article I, Section 19) and the Constitution of the United States of America (particularly Article I, Section 10, Article VI, Section 2, and the due process and equal protection clauses of the Fourteenth Amendment).

16

Defendant Bruce R. Poulton is a citizen and resident of Wake County North Carolina. At all times alleged herein, Bruce R. Poulton acted under color of State and Local governmental authority, and:

a. Individually, and, plaintiff is

informed and believes and, therefore, alleges,

b. As Chancellor of North Carolina State University,

c. As agent, servant, and employee of North Carolina State University, and

d. At all times under color of his employment by North Carolina State University.

17

Defendant W. J. Harris is a citizen and resident of Warren County, North Carolina.

18

Defendant Clyde R. Edwards is a citizen and resident of Warren County, North Carolina.

19

Defendant William T. Skinner, III, is a citizen and resident of Warren County, North Carolina.

20

Defendant Herbert C. Harris is a citizen and resident of Warren County, North Carolina.

21

Defendant George E. Shearin, Sr., is a citizen and resident of Warren County, North Carolina.

22

Defendants W. J. Harris, Clyde R. Edwards, William T. Skinner, III, Herbert C. Harris, and George E. Shearin, Sr., were at all times alleged herein the elected members of the Board of Warren County Commissioners. At all times alleged herein, each of these defendants acted under color of State and Local governmental authority and:

a. Individually,

b. As a Warren County Commissioner,

c. As an agent of Warren County and the Board of Warren County Commissioners,

d. As co-conspirators with the other named defendants and unnamed co-conspirators to interfere with plaintiff's contractual rights with certain of the defendants and to deprive plaintiff of the rights guaranteed to her by Title VII of the Civil Rights Act of 1964, the rights and protections afforded plaintiff by 29 USC 623 et sequentia, other laws and protections as set forth herein, and the rights guaranteed to plaintiff under the Constitutions of the State of North Carolina and the United States of America as set forth herein.

Plaintiff is informed and believes and, therefore, alleges that Glenwood Newsome is a citizen and resident of Warren County, North Carolina. At all times alleged herein, Glenwood Newsome was employed by Warren County and the Board of

Warren County Commissioners as County Manager and that at all times alleged herein he acted under color of state and local governmental authority and in collusion with and as a co-conspirator with the other named and unnamed co-conspirators.

23

Defendant Russell C. King is a white male citizen and resident of Warren County, North Carolina. At the time of the acts alleged herein, Russell C. King was, plaintiff is informed and believes and, therefore, alleges, 34 years old.

24

Prior to his appointment to the position of County Chairman of the Agricultural Extension Service for Warren County, Russell C. King had been employed by the North Carolina Agricultural Extension Service for two years and eight months.

At all times alleged herein, Russell C. King acted under color of State and Local Governmental authority, and:

a. Individually,

b. In his capacity as the agent, servant, and employee of, and at all times acted under color of his employment by, the North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners,

c. As a co-conspirator with other named defendants and unnamed co-conspirators to deprive the plaintiff of rights guaranteed to her in equity, by law, and by the Constitution of the United States and the State of North Carolina.

Defendants are an "employer" within the meaning of 42 USC 2000e-(b), 42 USC 2000e-2(a), 29 USC 623(a), 29 USC 623(d), 29 USC 630(b),and other. Defendants are engaged in commerce or industry affecting commerce or both within the meaning of 42 USC 2000e(g), 42 USC 2000e(h), 29 USC 630(g), and 29 USC 630(h).

At all times herein complained of defendants North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and Board of Warren County Commissioners operated and maintained a facility at 101 South Main Street, Warrenton, North Carolina, which facility has employed 13 persons for each working day in each of 20 or more calendar weeks in each of the five years immediately preceding the filing of this action.

Each the North Carolina Agricultural Extension Service and North Carolina State

University employs hundreds of persons throughout the State of North Carolina and have so employed hundreds of persons for each working day in each of 20 or more calendar weeks in each of the five years immediately preceding the filing of this action.

Each Warren County and the Board of Warren County Commissioners has employed over 20 persons for each working day in each of 20 or more calendar weeks in each of the five years immediately preceding the filing of this action.

In addition or in the alternative, defendants are "employers" within the meaning of 29 USC 630(b)(1), 29 USC 630(b)(2), and 42 USC 2000e(f).

27

This is, in part, a proceeding for a declaratory judgment as to plaintiff's rights and for a permanent injunction restraining defendants from maintaining either a policy, practice, custom, or

usage of discrimination against the female plaintiff because of sex and age with respect to compensation, terms, conditions, and privileges of employment and in ways which deprive plaintiff of equal employment opportunities and in ways which otherwise affect her status as an employee because of sex, age, and otherwise.

28

This complaint also seeks restitution to plaintiff of all rights, privileges, benefits, and income she would have received but for defendants' unlawful and discriminatory practices, as well as promotion to the job for which she was entitled and which she would have received but for the unlawful and wrongful practices of the defendants as set forth in this complaint.

29

Plaintiff has been an employee of the North Carolina Agricultural Extension

Service and North Carolina State University since September 1, 1948.

Since September 1, 1951, plaintiff has worked in Warren County and has, in addition, been an employee of Warren County and the Board of Warren County Commissioners.

Under the "Memorandum of Understanding" entered into by and between the North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners, plaintiff's tenure of employment has been subject to the approval of Warren County and the Board of Warren County Commissioners so that, de facto, plaintiff has been an employee of Warren County and the Board of Warren County Commissioners since September 1, 1951. Plaintiff receives her pay in the form of two checks: One from the North Carolina Agricultural Extension Service

and one from Warren County.

30

In consideration for plaintiff's working for the defendants, the defendants have, over the years, enacted certain procedures purportedly for ensuring that their employees, and particularly this plaintiff, are to be treated fairly particularly as relates to compensation the employees receive, opportunities for promotion, and benefits, which procedures are in the nature of a contract between the defendants and the plaintiff.

Particularly, the plaintiff relied upon representations by the defendants the North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners that they were equal employment opportunity employers and that as a consideration for her working for the defendants that she had a right to apply for position vacancies for which she was

qualified, and that if she were the most qualified applicant that she would be given the position.

31

As a matter of practice and for the majority of the years during which the plaintiff has been employed by the defendants North Carolina Agricultural Extension Service and North Carolina State University, the County Chairmanship positions and their equivalents with the Agricultural Extension Service were granted only to white male employees with greatest seniority. Blacks and women were not even considered for these positions which carried greater prestige and compensation.

In recent years, the North Carolina Agricultural Extension Service and North Carolina State University purported to become equal employment opportunity employers. As a matter of practice,

however, there have been only token appointments to County Chairmanships of women.

In recent years, the North Carolina Agricultural Extension Service and North Carolina State University announced that seniority would no longer be a consideration for County Chairmanships. Plaintiff is informed and believes and, therefore, alleges that this announcement was consistent with the subsequent practices of the North Carolina Agricultural Extension Service and North Carolina State University to recommend younger candidates (particularly those under the age of 40) for the positions, even though there were older applicants for the position (less than 69 years of age) who were more qualified or equally qualified with the younger applicants, and to keep women with seniority from becoming County Chairmen ahead of men without seniority.

In the Spring of 1979, there was an announcement by North Carolina Agricultural Extension Service that the position of County Chairman of the North Carolina Agricultural Extension Service in Warren County would shortly exist by reason of the retirement of the then current County Chairman of the Extension Service. Interested applicants were to submit their applications by a certain date.

At the time, there was a lawsuit pending in Federal Court which had been brought by a group of black Extension Service employees.

32

Plaintiff followed all of the appropriate application procedures, and had an interview with a selection committee composed of three administrative agents of the North Carolina Agricultural

Extension Service.

Plaintiff's competition for the position was a black male who was not as qualified for the position as the plaintiff. Plaintiff was the more qualified of the two applicants for the position.

The black male was recommended by the North Carolina Agricultural Extension Service to the Board of Warren County Commissioners for the position, and the Board of Warren County Commissioners approved the recommendation and the black male was given the job.

It was general knowledge that plaintiff had not been promoted to the position she by all right should have had, and that a grave injustice had been done to the plaintiff in the form of sex and race discrimination. Although plaintiff was not pleased that she had been so victimized, and her awareness of the injustice that had been done her was

generally known to the defendants or a portion of them or all, she did not file a claim of discrimination because she was apprehensive that she would be discharged from her employment.

33

On February 25, 1982, plaintiff saw a staff vacancy sheet which announced that the position of Warren County Extension Chairman would be vacant again due to the fact that the then current chairman was retiring.

The position of County Chairman involves duties which may be handled equally well by male or female, young or old, and better by a person of greater qualifications.

Applications were to be submitted before March 15, 1982. Further instructions were that each individual interested in applying for the position should contact his District Chairman before contacting Paul E. Dew.

Hugh L. Liner was the plaintiff's District Chairman.

34

On March 1, 1982, Hugh L. Liner met with the Warren County Extension staff and announced the vacancy. He also announced the procedures which would be followed in filling the vacancy. Each person present, including plaintiff and Russell C. King, was instructed that he was not to get people to write letters on his behalf, and that Hugh L. Liner did not want "campaigning."

In accordance with the instructions of Hugh L. Liner, plaintiff expressed her interest in the position and was told by Hugh L. Liner to write a letter to Paul E. Dew expressing her interest.

Plaintiff wrote such a letter on March 9, 1982.

About this time, Russell C. King advised plaintiff that he was seeking the position also. Russell C. King was not

equally qualified to the plaintiff and was in fact less qualified than the plaintiff for the vacancy by reason of background, education, experience, and all other.

Russell C. King is a male and was age 34 at the time of the acts alleged herein.

35

At some point unknown to the plaintiff following the announcement of the then current County Chairman's retirement, plaintiff is informed and believes and, therefore, alleges that a young Warren County farmer, Jim Harris, who was a member of an organization of young farmers organized in part through the efforts of Russell C. King, contacted Chester D. Black to arrange to surreptiously meet with Chester D. Black, Hugh L. Liner, and Paul E. Dew and some young (under age 40) Warren County farmers in Louisburg in an adjoining county for purposes of discussing the appointment of a new County Chairman.

Russell C. King had been instrumental in getting this group of young farmers organized.

Russell King worked in this organization of these young farmers with Jim Harris and Irvin D. Smith.

36

The meeting was subsequently held in Louisburg on March 11, 1982.

Those in attendance at the meeting knew at the time that there were three applicants for the County Chairmanship and that the three were Russell C. King, Emily Ballinger, and George W. Koonce.

Plaintiff is informed and believes and, therefore, alleges that the moving force behind the meeting was Russell C. King, and that he knew of the plans of the members of this group of young farmers to seek such a meeting.

Plaintiff is further informed and believes and, therefore, alleges that the purpose of the meeting was to formulate a

plan and scheme to ensure that neither the plaintiff nor George W. Koonce (a black male over age 40) received the appointment as the new County Chairman.

In addition or in the alternative, plaintiff is informed and believes and, therefore, alleges that the group of young farmers brought pressure to bear on Hugh L. Liner, Chester D. Black, and Paul E. Dew that the next County Chairman be trained in agriculture and that the next County Chairman be Russell C. King, and that the vacancy created by the retirement of the then County Chairman be filled with a livestock agent.

Russell King was an applicant trained in agriculture, and plaintiff is informed and believes and, therefore, alleges that the group of young farmers actively sought and campaigned (1) for Russell King's appointment to the position; (2) that a male over 40 and less than 69 be not appointed; (3) that a black be not

appointed; (4) that a female (Emily Ballinger) be not appointed; and (5) that a female over 40 and less than 69 (Emily Ballinger) be not appointed.

Plaintiff is further informed and believes and, therefore, alleges that Russell King knew the meeting was planned and that it was "suggested" that he not attend by one or more of the defendants with his concurrence.

If Hugh L. Liner, Chester D. Black, and Paul E. Dew had not decided prior to March 11, 1982, to see that plaintiff did not get the position of County Chairman, all of which is denied, they were certainly aware of a political pressure group organized in part by Russell C. King's desire to see (1) that plaintiff did not get the appointment and (2) that Russell C. King did receive the appointment and Hugh L. Liner, Chester D. Black, and Paul E. Dew joined with the political pressure group's efforts to see

that plaintiff did not get the position, although such was a wrong to the plaintiff.

37

A day or so following March 16, 1982, plaintiff received a letter from Paul E. Dew setting an appointment for her to come for an interview in Raleigh on March 23, 1982. Plaintiff was instructed to bring five copies of her resume with her to the interview.

38

On March 23, 1982, plaintiff went to Raleigh for her interview. Present for the interview were Chester D. Black, Paul E. Dew, and Hugh L. Liner.

39

One of the first observations made by the committee, specifically Chester D. Black, was that from looking at plaintiff's resume he noticed that she was getting near or in the range of retirement age. Plaintiff had no intention of

retiring then, and she has no intention of retiring now. Plaintiff was interrogated on the point of her age and her retirement.

40

As plaintiff left the interview, Russell C. King was waiting in the outer office for his interview.

41

Plaintiff is informed and believes and, therefore, alleges, that either during Russell C. King's interview or thereafter, Russell C. King, either on his own initiative or at the suggestion of Chester D. Black, Paul E. Dew, and Hugh L. Liner, or one or more of them, prepared another resume (and after the March 23, 1982, purported deadline) which resume contained certain representations which were not entirely candid, but which new resume had the overall effect of presenting Russell C. King in a more favorable light.

42

Plaintiff is informed and believes and, therefore, alleges that the second application was prepared by Russell C. King on March 30, 1982, and received by the North Carolina Agricultural Extension Service sometime thereafter, and that it was this second application which was submitted to the Board of Warren County Commissioners when the North Carolina Agricultural Extension Service made its recommendation to the Board of Warren County Commissioners for the appointment of Russell C. King to the position.

43

On March 24, 1982, The Warren Record published a letter to the Editor from one Irvin D. Smith (an active force in the young farmers association organized by Russell C. King and one of the young farmers present at the meeting in Louisburg), which letter was critical of all areas of the Warren County Extension

Service (and particularly the area over which the plaintiff had responsibility) except for the area over which Russell C. King had responsibility.

44

Russell C. King had contact with and worked with Irvin D. Smith. The letter among other called upon farmers to appear at the County Commissioners meeting on April 5, 1982, at which time the County Chairman was to be selected to insure that "a railroad job" was not put on the farmers again. The letter furthered the cause of a young (under 40) male against a female and against a person between the ages of 40 and 69's being apppointed County Chairman.

45

Plaintiff is informed and believes and, therefore, alleges that Russell C. King had expressed his interest in the County Chairmanship to Irvin D. Smith, and that Russell C. King either knew that the

letter was going to be written in advance of its writing or encouraged Irvin D. Smith's overt support, or both.

46

A staff meeting of the Warren County Extension Service was called by the County Chairman on March 26, 1982, which meeting was attended by plaintiff, Russell C. King, and others.

The subject of the meeting was the letter to the Editor of The Warren Record.

The County Chairman indicated that he planned to advise Hugh L. Liner of the letter. A copy of the letter was sent to Hugh L. Liner.

47

On March 29, 1982, plaintiff spoke with Hugh L. Liner and expressed her concerns about the letter.

Hugh L. Liner's only response was that he had read the letter several times and that he did not consider the letter an

attack on the plaintiff.

The reasonable inference to be drawn from the letter is that it was, in fact, an attack on the plaintiff and an attack against (1) a female, (2) a person over 40 and less than 69, and (3) a black's being appointed County Chairman.

A copy of the letter is appended hereto as Exhibit D.

48

Prior to April 2, 1982, the procedure followed by the North Carolina Agricultural Extension Service as relates to Warren County was to recommend only one candidate to the County Commissioners for the position of County Chairman.

49

The stated policy of the North Carolina Agricultural Extension Service was to recommend the most qualified applicant to the Commissioners although, de facto, this policy was widely ignored

when the most qualified applicant was a woman as is, in part, evidenced by the fact that the plaintiff was not solely recommended and that in the entire over 50 year history of the Extension Service there have only been six female County Chairmen and four of those were in districts which had a female district Chairman, and, of late, when the more qualified applicant was over 40.

50

There had, at that time, never been a female County Chairman in a county in a district over which Hugh I. Liner was chairman, and there has never been a female chairman in Warren County.

51

Plaintiff is informed and believes and, therefore, alleges that prior to April 2, 1982, defendants North Carolina Agricultural Extension Service, North Carolina State University, Hugh L. Liner, Paul E. Dew, and Chester Black wilfully

decided to recommend Russell C. King for the position of County Chairman and that the decision to recommend Russell L. King was based on age, sex, and other impermissible and discriminatory considerations and all in furtherance of the scheme and conspiracy then underway to see that Russell C. King received the position and that plaintiff did not, thereby violating 42 USC 2000e-2, 29 USC 623(a)(1), 42 USC 1983, 42 USC 1985, and other applicable laws.

Plaintiff is further informed and believes and, therefore, alleges that these same defendants, acting in concert with other named and unnamed co-conspirators, and in an effort to avoid responsibility for their actions in the event plaintiff filed a discrimination charge, decided to and did submit plaintiff's name to the Commissioners for consideration, while at the same time working surreptiously, and permitting

others to work surreptiously, to see that plaintiff did not get the position.

On April 2, 1982, Hugh L. Liner met with plaintiff and Russell C. King and advised them that in this case "we are going to make a little change. We are going to recommend the two of you to the Board of Warren County Commissioners on Monday and let them decide."

52

Defendants further advised plaintiff and Russell C. King that whichever one received the appointment would receive a salary increase of $2,500 over his present salary.

It is noted and alleged that $2,500 added to plaintiff's salary at that time would have resulted in her being paid less than the retiring male County Chairman with less experience and fewer educational and other qualifications had earned at the time he was so employed and this was unlawful discrimination against the

plaintiff.

53

Hugh L. Liner advised plaintiff and Russell C. King that the new procedure which would be followed would be that the Board of Warren County Commissioners would interview each of the applicants and make its decision thereafter.

54

Hugh L. Liner further instructed plaintiff and Russell C. King to not go out and get people to come in to support them at the Commissioners' meeting, although Hugh L. Liner knew, or in the exercise of ordinary care he should have known, from the surreptious meeting he had attended in Louisburg, the letter to the editor, and other, that supporters of Russell L. King would likely attend the Commissioners' meeting and that an active campaign was underway for Russell C. King's appointment to the position.

55

Plaintiff followed these instructions of Hugh L. Liner meticulously and even to the point that when she was approached by several people who wanted to write letters and attend the Commissioners' meeting in support of her appointment, she asked them to not do so, in accordance with the instructions Hugh L. Liner had given from the beginning.

56

The Board of Warren County Commissioners met on April 5, 1982, and plaintiff is informed and believes and, therefore, alleges that a group of young farmers originally organized in large part by Russell C. King and who supported Russell C. King's appointment appeared before the County Commissioners to campaign in his behalf.

57

Plaintiff is informed and believes and, therefore, alleges that Hugh L. Liner

appeared before the Board of Warren County Commissioners to offer the endorsement of the North Carolina Agricultural Extension Service and North Carolina State University to the appointment of Russell C. King, and that when asked by the Commissioners about the ability of a woman to fill the role and the experience of the Extension Service with other female County Chairman that Hugh L. Liner failed to do all that was reasonably appropriate to advise the Board of County Commissioners that there was nothing related to gender which made one sex more qualified than the other sex to fulfill the duties of the County Chairmanship.

58

Plaintiff is further informed and believes and, therefore, alleges that Hugh L. Liner actually recommended Russell C. King in manner adverse to the plaintiff, and that the Commissioners actually selected Russell C. King as County

Chairman during their morning session and prior to their interviewing the plaintiff, and that the selection of Russell C. King by the Board of Commissioners was a foregone conclusion even before the meeting.

59

Plaintiff learned of the appointment of Russell C. King during the afternoon of April 5, 1982.

60

Plaintiff is informed and believes and, therefore, alleges that the fact that the plaintiff is a female, the fact that the plaintiff was 55 years old at the time, and the fact that political pressures then prevalent (1) to appoint a man, (2) to appoint a person under age 40, (3) to not appoint a woman, (4) to appoint Russell C. King as County Chairman, (5) the policies and practices of the defendants to appoint younger persons as County Chairman, and (6) the practice of

the defendants to favor males over females for the position of County Chairman were the bases upon which Russell C. King was given the position and the plaintiff was not given the position.

61

The North Carolina Agricultural Extension Service had an established grievance procedure in which the plaintiff had a vested interest as an employee of the North Carolina Agricultural Extension Service, which procedure was purportedly established to provide "for an adequate and fair hearing of grievances for each individual without regard to race, color, age, national origin, handicap, sex, or religion, where the grievance is based upon denial of equal employment opportunity or discrimination."

62

Plaintiff filed a grievance on April 30, 1982, in accordance with the established procedure.

63

A hearing on the grievance was scheduled to be conducted in accordance with the established grievance procedures on September 9, 1982.

A hearing was held on September 9, 1982. During the hearing testimony disclosed the fact that plaintiff's being a woman may have influenced the decision of the Commissioners to not appoint her, and that if plaintiff had been a male she would have likely received the appointment.

The hearing committee subsequently convened and issued the findings and recommendations contained in the attached document styled Exhibit E, which are hereby incorporated into and made a part of this complaint by reference.

64

When the findings were reviewed by Chester D. Black, he ordered the hearing committee to reconvene and reconsider the

matter.

65

The hearing committee so reconvened on October 18, 1982, and the findings of the committee are contained in the document styled Exhibit F, which is hereby incorporated into and made a part of this record by reference.

66

In each instance, the findings were highly favorable to plaintiff and highly unfavorable to the North Carolina Agricultural Extension Service.

67

On September 21, 1982, plaintiff filed charges of discrimination with the Employment Security Opportunity Commission.

68

On or about November 23, 1982, plaintiff received a performance evaluation purportedly based on her performance for a period from October 1,

1981, to September 24, 1982.

The performance evaluation was made by Russell C. King and covered a period of from October 1, 1981, through April 30, 1982, during which Russell C. King was not County Chairman nor the plaintiff's supervisor.

The performance rating, upon which salary increases are based, was the worst performance evaluation plaintiff had received in her 33 years with the North Carolina Agricultural Extension Service, and was grossly unfair to the plaintiff. This was discrimination against the plaintiff.

Plaintiff is informed and believes and, therefore, alleges that the lowered performance rating was a retaliatory act on the part of the defendants for plaintiff's having filed a grievance and having filed discrimination charges and notice of intent to sue with the Equal Employment Opportunity Commission and that

such retaliation was violative of 29 USC 623(d), 42 USC 2000e-3(a), and other.

Plaintiff deserved a better performance rating than that which was given to her.

69

Plaintiff sought redress for the poor performance rating from her District Chairman, Hugh L. Liner, and was given no satisfaction.

70

Plaintiff is informed and believes and, therefore, alleges that she has been discriminated against due to her sex, age, and otherwise in violation of 42 USC 2000e-2(a)(1), 42 USC 2000e-2(a)(2), 29 USC 623(a)(1), 29 USC 623(a)(2), 29 USC 623(d), 42 USC 1983, 42 USC 1985, and otherwise as set forth in this complaint.

71

Plaintiff is informed and believes and, therefore, alleges that:

a. Defendants discriminate against

females as a class, and discriminated against this plaintiff in particular, in their promotion practices and procedures, in violation of Title VII of the Civil Rights Act of 1964, as amended.

b. Defendants discriminate against persons who are over 40 years and less than 69 years of age, and discriminated against this 55 year old plaintiff, in particular, in their promotion practices and procedures, in violation of 29 USC 623(a)(1), 29 USC 623(a)(2), 29 USC 623(d), 29 USC 216(b) and 29 USC 217.

c. Defendants discriminate against persons who apply for promotions, and this plaintiff in particular, by conspiring to and actually undermining the stated and established procedures the

defendants have created in an effort to ensure that only those persons whom the defendants subjectively prefer for the positions are selected for the positions.

d. Defendants acting under color of state and local authority violated plaintiff's rights guaranteed by the Constitution of the State of North Carolina (particularly, but not limited to Article I, Section 19), the Constitution of the United States of America (particularly, but not limited to Article I, Section 10, Article VI, Section 2, and the due process and equal protection provisions of the Fourteenth Amendment) and laws designed for the protection of those persons as the plaintiff (particularly, but not limited to 42 USC 2000e

et sequentia, 29 USC 623 et sequentia, 29 USC 216 et sequentia, 29 USC 217, 42 USC 1983, and 42 USC 1985).

72

As a proximate result of the acts of the defendants as alleged herein and otherwise, plaintiff has sustained damages including, but in nowise limited to:

a. Plaintiff was denied the promotion to which she was entitled.

b. Plaintiff was denied the salary increase and increase in retirement fund contributions to which she was entitled and the increases in each since that she would have received.

c. Plaintiff has been victimized by the conspiracy and scheme of the defendants to prevent her receiving the promotion.

d. The acts of the defendants as

alleged herein have resulted in embarrassment and humiliation to the plaintiff and damage to plaintiff's standing in her profession and throughout the state. The acts of the defendants have caused plaintiff anxiety, mental anguish, and depression.

73

Plaintiff is entitled to have and recover of the defendants, and hereby seeks recovery from the defendants of, all rights, privileges, benefits, and income that she would have received but for defendants' unlawful and discriminatory practices, and she hereby seeks:

a. That she be appointed County Chairman of the Agricultural Extension Service for Warren County, retroactive to May 1, 1982, (or in the alternative that she be granted front pay and

benefits),

b. That she be awarded the pay differential between her present position and that of County Chairman retroactive to May 1, 1982,

c. That her personnel record be expunged of the poor performance rating given her on November 23, 1982, and any subsequent given unfair ratings and that she be properly and fairly evaluated, and

d. That her salary be appropriately increased, retroactive to November 23, 1982, based upon a reevaluation and proper assessment of her performance.

e. That defendants be ordered and directed to pay her attorney's fees and expenses incident to her efforts to redress the grievances imposed upon her by the

defendants.

Plaintiff is informed and believes and, therefore, alleges that the discriminatory and other acts alleged herein which acted to the detriment of the plaintiff were calculated, knowing, and wilful. Plaintiff is entitled to have and recover liquidated damages in addition to other damages requested herein.

SECOND CAUSE OF ACTION

Plaintiff, complaining of the defendants as a second cause of action, alleges:

1 through 73

Paragraphs 1 through 73 of the first cause of action are hereby incorporated by reference into this cause of action as paragraphs 1 through 73.

74

Plaintiff is informed and believes and, therefore, alleges that she was obviously the more qualified applicant for the position and that this fact was known

to the defendants.

75

Plaintiff is informed and believes and, therefore, alleges that defendants North Carolina Agricultural Extension Service, North Carolina State University, Hugh L. Liner, Chester D. Black, and Paul E. Dew anticipated that if plaintiff were not recommended for the position that she would file a discrimination charge and that these defendants set about formulating a scheme and plan by which they could attempt to avoid responsibility for the plaintiff's not getting the position of County Chairman.

76

Pursuant to this scheme, plaintiff is informed and believes and, therefore, alleges that the North Carolina Agricultural Extension Service's, North Carolina States University's, Hugh L. Liner's, Chester D. Black's, and Paul E. Dew's "recommendation" of plaintiff to the

Board of Warren County Commissioners was merely ceremonial and done for the purpose of attempting to avoid their responsibility for plaintiff's not receiving the appointment.

77

Plaintiff is informed and believes and, therefore, alleges that Hugh L. Liner, Chester D. Black, and Paul E. Dew, in fact, plotted, schemed, and conspired with Russell C. King and members and representative of the young farmer's organization Russell C. King had been instrumental in organizing to launch a campaign to see that Russell C. King was granted the appointment. To assure that this result was achieved, these defendants, pursuant to their common scheme and conspiracy, prevented the plaintiff and her supporters from encouraging the appointment of the plaintiff to the position, recommended Russell C. King for the position, and set

about seeing that he was appointed to the position of County Chairman by the County Commissioners.

78

Plaintiff is informed and believes and, therefore, alleges that Hugh L. Liner, Chester D. Black, and Paul E. Dew, pursuant to their scheme and conspiracy, failed to fully advise Warren County, the Board of County Commissioners, and each of the named Commissioners that plaintiff was more qualified for the job, that the job required no skills unique to men, and that the performance of the few women who had been granted the position in other counties was equal to, if not superior to, that of their male counterparts.

79

Plaintiff is informed and believes and, therefore, alleges that Hugh L. Liner, Chester D. Black, and Paul E. Dew failed to apprise Warren County, the Board of County Commissioners, and each Warren

County Commissioner that plaintiff had been restrained by these defendants from having her supporters express their support for her appointment to the position under intimidation of subordination. Plaintiff is informed and believes and, therefore, alleges that Glenwood Newsome, the Board of Warren County Commissioners, Warren County, and each of the named commissioners had been extensively "lobbyed" by supporters of Russell C. King. The failure of the North Carolina Agricultural Extension Service, North Carolina State University, Hugh L. Liner, Chester D. Black, and Paul E. Dew to so advise Warren County, the Board of Warren County Commissioners, Glenwood Newsome, and the named commissioners that restraints had been placed on plaintiff and her supporters thus fostered the erroneous conclusion on the part of Warren County, the Board of Warren County Commissioners, and each named commissioner

that there was little or no local support for plaintiff and much support for Russell C. King

80

Under the "Memorandum of Understanding" the North Carolina Agricultural Extension Service and North Carolina State University and their agents, servants, and employees, assumed the responsibilities for affirmative action and Equal Employment Opportunites.

81

It was the duty and responsibility of these defendants to guide the Board of Warren County Commissioners in these matters.

82

A proper guidance of the County Commissioners by these defendants would have resulted in a single recommendation of plaintiff for the position and plaintiff is informed and believes and, therefore, alleges that she would have

been "approved" for the appointment in accordance with procedures set forth in the "Memorandum of Understanding." However, such was not consistent with the scheme and conspiracy of these defendants.

83

Plaintiff is informed and believes and, therefore, alleges that the Board of Warren County Commissioners, Warren County, Glenwood Newsome the County Manager, and each of the defendants who were Warren County Commissioners at the time of the acts alleged herein joined the conspiracy of the other named and unnamed co-conspirators and that they knowingly and wilfully based their decision on knowingly and wilfully wrong and unlawful considerations of sex, age, political pressures, and other and that they "went along with" the other named and unnamed co-conspirators in in causing Russell C. King to be appointed County Chairman and for plaintiff to not so be appointed

County Chairman.

84

As a proximate result of the conspiracy of the defendants, plaintiff was not granted the position of County Chairman, plaintiff has been deprived of the benefits the position would have carried, plaintiff has suffered embarrassment, humiliation, damage to her professional standing throughout the state, anxiety, mental anguish, and depression.

85

The acts of these defendants, in the manner alleged herein and otherwise, are so outrageous as to warrant an award of punitive damages.

THIRD CAUSE OF ACTION

Plaintiff, complaining of the defendants as a third cause of action alleges:

1 through 85

Paragraphs 1 through 85 of the plaintiff's second cause of action are hereby incorporated into and made a part of this cause of action by reference.

86

Defendants, and each of them, at all times alleged herein, acted under color of statute, ordinance, regulation, custom, and usage of the state while subjecting the plaintiff to the deprivation of rights, privileges, and immunities secured unto her by the Constitution of the United States, by 42 USC 2000e-2(a), 29 USC 623(a), 29 USC 623(d), and other as set forth in this complaint.

87

As a proximate result of the acts of the defendants as alleged herein, plaintiff has sustained damages including loss of the privileges and benefits which accompany the position of County Chairman, loss of salary and wages the plaintiff

would have received but for the acts of the defendants, damage to plaintiff's reputation and standing in the community, embarrassment, anxiety, mental anguish, depression, and other damages.

88

The actions of the defendants as alleged herein and otherwise were willful, were knowingly wrong, and are such as to warrant an award of punitive damages to the plaintiff.

89

Plaintiff has incurred legal expenses and attorney's fees and anticipates incurring additional such charges for which she is entitled to reimbursement, and she hereby so prays for her expenses and attorney's fees.

FOURTH CAUSE OF ACTION

Plaintiff, complaining of the defendants as a fourth cause of action, alleges:

1 through 73

Paragraphs 1 through 73 of the first cause of action are hereby incorporated by reference into this cause of action as paragraphs 1 through 73.

74 through 84

Paragraphs 74 through 84 of the second cause of action are hereby incorporated by reference into this cause of action as paragraphs 74 through 84.

85 through 89

Paragraphs 85 through 89 of the third cause of action are hereby incorporated by reference into this cayse of action as paragraphs 85 through 89.

90

The plaintiff and the defendants North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and Board of Warren County Commissioners entered into agreements and contracts of employment whereby the plaintiff would work for the defendants

North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and Board of Warren County Commissioners under certain terms and conditions including, but in nowise limited to, equal opportunities for women and persons between 40 and 69 years of age as contrasted with persons of other ages, equal opportunities for females as contrasted with males, equal opportunities for white persons as contrasted with black persons, and due process and "fair play" in promotions and appointments to positions.

91

The plaintiff has at all times done and performed all of the stipulations, conditions, and agreements provided by the contract to be performed on her part at the time and in the manner provided by the contract. The plaintiff has ever been and still is ready and willing to perform the agreements and contracts on her part.

92

The defendants North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and Board of Warren County Commissioners have failed and refused and still fail and refuse to perform the agreements and contracts on their part.

93

By reason of the breach of the contract by the defendants, North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and the Board of Warren County Commissioners the plaintiff has suffered damages and has been damaged in the sum of $200,000, no part of which has been paid.

WHEREFORE, plaintiff prays the court that a jury be empanelled to try the issues and that plaintiff have and recover of the defendants and each of them, jointly and severally:

1. That the Court declare

plaintiff's rights under the circumstances and conditions alleged in the first cause of action and issue orders to secure these rights to the plaintiff.

2. That the Court issue a permanent injunction barring the defendants from engaging in the discriminatory practices alleged.

3. That the plaintiff be forthwith given the position of Warren County Extension Chairman, retroactive to May 1, 1982, and that the plaintiff be made whole for all salary, benefits, and other which she would have and all she should have received in her position as County Chairman but for the discriminatory practices of the defendants.

4. In the alternative to plaintiff's being given the position of Warren County Extension Chairman,

retroactive to May 1, 1982, that the plaintiff be awarded back pay, front pay, increment pay increases, and other benefits equal to those to which she would have been, should have been, and would be entitled as the Warren County Extension Chairman.

5. That the plaintiff be awarded liquidated damages in the sum determined by the Court to be appropriate under the circumstances of this case and not less than $200,000.

6. That the plaintiff have and recover of the defendants the sum of $200,000 damages for damage to reputation and standing, embarrassment, humiliation, anxiety, mental anguish and depression, as alleged in the first cause of action.

7. That the plaintiff have and

recover of the defendants $200,000 actual damages for damages to the plaintiff from the conspiracy of the defendants as alleged in the second cause of action.

8. That plaintiff have and recover of the defendants $1,000,000 punitive damages for conspiracy as alleged in the second cause of action.

9. That plaintiff have and recover of the defendants and each of them $200,000 actual damages for violation of plaintiff's rights secured by the Constitutions of the United States, the State of North Carolina, and laws of the land as alleged in plaintiff's third cause of action.

10. That plaintiff have and recover of the defendants and each of them $1,000,000 punitive damages

for matters and things alleged in plaintiff's third cause of action.

11. That plaintiff have and recover of the defendants North Carolina Agricultural Extension Service, North Carolina State University, Warren County, and Board of Warren County Commissioners $200,000 damages for breach of contract as set forth in the fourth cause of action.

12. That the plaintiff have and recover of each of the defendants, and that defendants be required to pay, $2,000,000 punitive and exemplary damages.

13. That plaintiff have and recover of the defendants attorneys' fees and the costs and expenses of this action, including reasonable attorneys' fees.

14. That plaintiff have and recover

of the defendants other relief as prayed for in the complaint and such other and further relief as to the court may seem just and proper.

This the 8th day of March, 1984.

s/MAX D. BALLINGER
Attorney for Plaintiff

OF COUNSEL:

Max D. Ballinger
Attorney and Counsellor at Law
Post Office Box 8104
Greensboro, North Carolina 27419-8104
919/294-3387

Complaint duly verified by
Emily Ruth Ballinger

March 8, 1984

Defendant's Exhibit 1, at the

Deposition of Emily R. Ballinger

Filed with the Court on April 1, 1985

IN MATTER OF:

Grievance Filed By:

EMILY R. BALLINGER

Before the

Grievance Committee

North Carolina Agricultural Extension

Service

June, 1982